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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

TRUCKEE-CARSON IRRIGATION DISTRICT,
DAVID L. MATLEY and CHRISTINE L. MATLEY
FAMILY TRUST, *et al.*,
Petitioners,

VS.

UNITED STATES OF AMERICA and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether the prohibition against interference with, and the requirement that the Department of Interior proceed in conformity with, state law relating to the appropriation, use and distribution of water used in irrigation at federal reclamation projects, in Section 8 of the Reclamation Act of 1902, 43 U.S.C. § § 372, 383, prevents the Department of the Interior from promulgating a regulation, pursuant to Section 10 of the Reclamation Act of 1902, 43 U.S.C. § 373, establishing a federal process that supersedes state water law procedures for determining the water duties for individual farm units in such a project.

Whether, pursuant to Section 10 of the Reclamation Act of 1902, 43 U.S.C. § 373, the Department of the Interior may interpret and apply terms used in a federal water rights decree, and whether the court that issued the decree then must give deference to those interpretations and applications.

PARTIES

The petitioners are the Truckee-Carson Irrigation District, David L. Matley and Christine L. Matley Family Trust, Clifford and Winona Matley Family Trust, Matley Farms, Charles H. Currie and Belle Charlene Currie, Armond Capucci and Janice Capucci, Virgil M. Getto, Roy H. Zaugg and Raymond A. Peterson, Jr. and E. Lorraine Peterson.

The respondents are the United States and the Pyramid Lake Paiute Tribe of Indians.

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OPINIONS BELOW

Four related rulings were made by the United States District Court for the District of Nevada. None of those rulings is reported. The District Court's oral ruling of August 1, 1986, and its Findings of Fact and Conclusions of Law and Order, both dated September 11, 1986, are printed as Appendices G, H, and I hereto. The District Court's Order for Reconsideration, also dated September 11, 1986, is printed as Appendix J hereto. The District Court's Remand Order dated January 28, 1987, is printed as Appendix K hereto. The District Court's Final Order, dated February 11, 1988, is printed as Appendix M hereto. The decision of the United States Court of Appeals for the Ninth Circuit from which certiorari is sought, dated October 4, 1989, reversing the decision of the District Court, is reported at 887 F.2d 207 and appears as Appendix N hereto. The order of the Ninth Circuit

denying the petitions for rehearing and the suggestions for rehearing en banc, dated February 27, 1990, is not reported, but is printed as Appendix O hereto.

JURISDICTION

The Court of Appeals' decision was rendered herein on October 4, 1989 (App. A-116). Petitioners Truckee-Carson Irrigation District and David L. Matley and Christine L. Matley Family Trust et al. each filed timely Petitions for Rehearing on October 18, 1989. The Petitions for Rehearing were denied on February 27, 1990 (App. A-130). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT FEDERAL STATUTES

Section 8, Reclamation Act:

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. *Provided*, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right." 32 Stat. 390 (1902), 43 U.S.C. §§ 372, 383 (1982 ed.).

Section 10, Reclamation Act:

> "The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect." 32 Stat. 390 (1902); 43 U.S.C. § 373 (1982 ed.).

STATEMENT OF THE CASE

1. Background

This case concerns the Newlands Project, a federal reclamation project designed to irrigate a substantial area in the vicinity of Fallon, Nevada. Project water is stored in Lahontan Reservoir, a storage reservoir on the Carson River. Truckee River water is imported into Lahontan Reservoir via the Derby Diversion Dam and the Truckee Canal. *Nevada v. United States,* 463 U.S. 110, 115-116 (1983). Petitioner Truckee-Carson Irrigation District (TCID) is a Nevada irrigation district which operates the Project pursuant to a contract with the United States. The other petitioners are some of the farmers whose Project water supplies may be reduced by the Department of Interior (DOI) regulation at issue here.

In order to have the relative water rights of the Project and upstream water users determined, the United States commenced two comprehensive water right adjudication proceedings in the United States District Court for the District of Nevada. In both cases jurisdiction was based upon the predecessor to 28 U.S.C. § 1345. The first action, involving the waters of the Truckee River, was commenced in 1913 and became known as the *Orr Ditch* litigation. *Id.* at 116. The second, involving the waters of the Carson River, was commenced in 1925 and became known as the *Alpine* litigation. See, *United States v. Alpine Land & Reservoir Co.,* 431 F.2d 763, 765 (9th Cir. 1970), *cert. denied,* 401 U.S. 909 (1971). Both cases resulted in several years of hearings before different special masters. *Nevada,* 463 U.S. at 117; *Alpine,* 431 F.2d at 765.

On September 8, 1944, the court entered its final decree in *Orr Ditch.* That decree awarded Project farmers, after transportation losses, annual water duties of 3.5 acre feet per acre for bottom lands and 4.5 acre feet per acre for bench lands. The *Orr Ditch* decree did not specifically identify the Project bottom and bench lands. However, the *Orr Ditch* special master stated the matters to be considered in arriving at these designations included "kinds of soil, percolation, evaporation, transpiration, precipitation, character of the crops, surface waste, and climatic conditions affecting heat, cold, moisture and growth." June 12, 1925, Special Master's

General Explanatory Report, at A2. *United States v. Orr Water Ditch Company, et al.*, In Equity No. A-3 (D.Nev.).

The *Alpine* special master did not submit a proposed decree until 1951 and proceedings were not initiated to bring the *Alpine* litigation to conclusion until the 1970's. *United States v. Alpine Land & Reservoir Co.*, 503 F.Supp. 877, 878-79 (D.Nev. 1980), mod., 697 F.2d 851 (9th Cir.), *cert. denied*, 464 U.S. 863 (1983).

Like the *Orr Ditch* decree, the *Alpine* decree awarded, after transportation losses, annual water duties of 3.5 acre feet per acre for bottom lands and 4.5 acre feet per acre for bench lands. Id. at 888. Its decision was affirmed on appeal. *See, United States v. Alpine Land & Reservoir Co.*, (App. A-35—A-43). The *Alpine* decree also did not specifically identify the bench and bottom lands within the Project. However, in *Alpine*, the court specifically defined bench land on the upper Carson River as "coarse textured, highly permeable, excessively drained and low water holding capacity soils; deep groundwater depth (4 to 20 feet); moderately sloping topography; cobbles or boulders on the surface." (App. A-22). It also defined bottom land as "medium to fine textured, low permeability, poorly drained and medium water holding capacity soils; shallow ground water depth (0.3 to 3 feet); level topography." *Id.* The *Alpine* court retained broad authority to resolve disputes concerning the distribution of water (App. A-32—A-33). It also reserved jurisdiction to "modify, amend, eliminate, add to or change any provision of [the] Decree" (App. A-33).

Respondent Pyramid Lake Paiute Tribe of Indians (Tribe) is an Indian Tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 476. Some of its members live on the Pyramid Lake Indian Reservation, which encompasses Pyramid Lake. The Tribe is interested in reducing Truckee River diversions to the Newlands Project to as low a level as is possible, so that the Truckee River flows into Pyramid Lake will be as high as possible (App. A-117).

The United States has taken various actions to try to maximize Pyramid Lake inflows. For example, in the *Alpine* proceedings, the United States sought to limit water use on the Carson River

above the Project so as to maximize Carson River inflow into the Project. (App. A-20—A-21). At the same time, it sought to minimize releases from the Truckee Canal and the Project's principal reservoir for irrigation of Project lands by contending that a water duty of 3 acre feet per acre was reasonably sufficient for all Project farmlands. (App. A-13, A-17, A-35). Similarly, in *Nevada*, the United States attempted to shift Newlands Project water rights to Pyramid Lake. *Nevada*, 463 U.S. at 118.

The courts rejected both of these efforts. In *Alpine*, the court rejected the United States' argument, and awarded higher water duties. (App. A-18—A-19, A-36—A-43). In *Nevada*, this Court ultimately rejected the United States' claims on res judicata grounds, after strongly criticizing its attempts to deprive Project farmers of their water rights. *Nevada*, 463 U.S. at 126, 145.

2. Proceedings Below

While the United States was attempting through litigation to maximize Pyramid Lake inflows, it also was issuing regulations aimed at the same goal. Thus, in 1967, DOI began to issue annual regulations concerning operating criteria and procedures (OCAP) for the Project. In the 1985 and 1986 OCAP, DOI required TCID to use bench and bottom land maps created by DOI in delivering water to Project lands. According to the OCAP, objections to those maps were to be resolved pursuant to the *Alpine* and *Orr Ditch* Decrees (App. A-69—A-70).

TCID objected to the use of DOI's maps. At an April 25, 1986 hearing in *Pyramid Lake Paiute Tribe of Indians v. William P. Clark*, CV-85-197-BRT (D. Nev.) (hereinafter the "OCAP Litigation"), the parties considered how the dispute might be resolved and how Project bench and bottom lands might be identified. At that hearing, it was agreed that TCID would file a petition for declaratory relief in the Alpine litigation. 4/25/86 TR at 29; 35-38; 41. The court concluded, without objection from any party, that a second petition need not be filed in the *Orr Ditch* litigation. 4/25/86 TR at 35-38. The court ordered TCID to use the caption of the *Alpine* case and the docket subfile number next in order. 4/25/86 TR at 41.

Alleging federal question and mandamus jurisdiction and the court's continuing jurisdiction under *Alpine* and *Orr Ditch*, TCID filed its petition for declaratory relief seeking delivery of water based upon historical deliveries and contending that the court, not DOI, had the authority to identify bench and bottom lands (App. A-53—A-70). At the trial court level, DOI did not base its position on the assertion that it had rulemaking authority to develop and apply criteria and to establish the process for distinguishing between Project bench and bottom lands. For that reason the trial court's decisions do not directly address this issue. However, those decisions leave no doubt that the trial court concluded that DOI had no such authority.

On October 4, 1989, the Ninth Circuit reversed the trial court, holding that under Section 10 of the Reclamation Act of 1902, 43 U.S.C. § 373, DOI was authorized to promulgate regulations establishing initial bench and bottom land classifications. The court reasoned that Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383 did not limit DOI's authority because it merely requires DOI to proceed in conformity with state law when promulgating a regulation which deals with the appropriation, use or distribution of water used in irrigation. Therefore, ruled the court, DOI can regulate distribution, acquisition and vested water rights, if its regulations are not inconsistent with state law.

The court did not decide whether or not DOI's classification scheme conformed to state law. The Ninth Circuit instructed the District Court to determine that issue on remand, giving deference to DOI's action under the arbitrary and capricious standard of review pursuant to 5 U.S.C. § 706(2)(A).

On February 27, 1990, the Ninth Circuit denied petitions for rehearing and suggestions for rehearing en banc filed by TCID and David L. Matley et al.

ARGUMENT

The Court should grant the writ of certiorari for three reasons.

First, the Ninth Circuit's decision conflicts with this Court's decision in *California v. United States*, 437 U.S. 645 (1978). In

holding that DOI may develop its own procedures and criteria for identifying Project bench and bottom lands under Section 10 of the Reclamation Act, the Ninth Circuit decision allows DOI to avoid the federalism requirements of Section 8 of that Act without a specific Congressional directive that it do so. This conflicts with both the explicit holding and the policy statements in *California.*

Second, the relationship between the federalism requirements of Section 8 and the general administrative discretion of Section 10 of the Reclamation Act is of critical importance to the administration of that Act and to the extent to which deference will be given to state water law in that administration. Unless review is granted, the Ninth Circuit decision will allow DOI to replace state law processes intended to resolve substantive state law issues with federal regulations intended to resolve those same issues. It will also allow DOI by federal regulation to provide definition and meaning to general principles of state law. In holding that Section 8 merely requires DOI to follow state substantive law, the Ninth Circuit decision misconstrues the requirement that DOI "proceed in conformity" with state law and it wholly overlooks the directive that the Act not "in any way interfere with the laws of any State . . . relating to the control, appropriation, use, or distribution of water used in irrigation."

Third, in holding that DOI has such rulemaking authority under Section 10 in the context of an existing water rights decree, the Ninth Circuit decision allows DOI to impermissibly interfere with the inherent continuing jurisdiction of water rights courts to interpret, apply and enforce their decrees. With no explanation at all, the Ninth Circuit instructs the *Alpine* court to give deference to DOI's criteria for identifying "bench" and "bottom" lands even though it is that court's judgment which is being interpreted and ultimately enforced. Because water rights on a stream are interdependent, the Ninth Circuit decision interferes with the jurisdiction of water rights courts to enforce their decrees as to all water rights on the adjudicated streams and not merely those of reclamation project farmers.

1. The Ninth Circuit Decision Conflicts With *California v. United States*, 437 U.S. 645 (1978)

In *California v. United States*, 437 U.S. 645 (1978), the California State Water Resources Control Board (State Board) had issued permits authorizing DOI to appropriate water for the federal New Melones Project. The permits contained several major conditions. The United States contended on supremacy grounds that it need not comply with those state-imposed conditions.

In holding that the United States must comply with all conditions not inconsistent with express congressional directives, this Court held that Section 8 requires federal agencies to comply with state water rights laws unless those laws are inconsistent with "clear congressional directives." 438 U.S. 645; 672 n. 25. Contrary dictum in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958) and *City of Fresno v. California*, 372 U.S. 627 (1963) was disavowed. *Id.* at 674-75.

This Court reached its conclusion in part by considering the history of state and federal relations with respect to water law:

> The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the *consistent thread of purposeful and continued deference to state water law by Congress. Id.* at 653 (emphasis added).

This Court noted that the legislative history of the Act supported the conclusion that Section 8 required DOI to appropriate water "in strict conformity with state law." Representative Mondell, the principal sponsor of the Act in the House, had said:

> "[T]he Secretary of the Interior would proceed to make the appropriation of the necessary water by *giving the notice and complying with the forms of law of the State or Territory in which the works were located.*" 35 Cong Rec 6678 (1902) (emphasis added). The Secretary of the Interior could not take any action in appropriating the waters of the state streams "which could not be undertaken by an individual or

> corporation if it were in the position of the Government as regards the ownership of its lands." *Id.* at 665 (emphasis the Court's).

The legislative history also supported the conclusion that Section 8 required project water be *distributed* in accordance with state law. *Id.* at 667. The Congress had been impressed with the laws the states had established and the personnel available for administering the distribution of water. Senator Clark of Wyoming, one of the principal supporters of the reclamation bill stated:

> "In each and every one of the States and Territories affected, after a long series of experiments, after due consideration of conditions, there has arisen a set of men who are especially qualified to deal with local conditions. Every one of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution of this problem of irrigation in their individual localities. To take from these experienced men, to take from the legislatures of the various States and Territories, the control of this question at the present time would be something little less than suicidal. They are the men qualified to deal with the question, the laws are written up on their statute books and read of all men, and in every one of these States and Territories the laws have been passed that most diligently regard the rights of the settler and of the farmer . . . " *Id.* at 667.

The legislative history also provided the practical rationale for Section 8:

> "[I]f the appropriation and use were not under the provisions of the State law the utmost confusion would prevail" [Citation]. Different water rights in the same State would be governed by different laws and would frequently conflict. A principal motivating factor behind Congress' decision to defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality. *Id.* at 668-69.

Rejecting, the United States' contention that Section 8 merely required it to file a notice of intent to appropriate and to thereafter ignore the substantive provisions of state law, this Court said:

> The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, *as well as the form,* of state water law. The Government's interpretation would trivialize the broad language and purpose of § 8. *Id.* at 675 (emphasis added).

The Ninth Circuit acknowledged that state law regarding the acquisition and distribution of reclamation water applied, if not inconsistent with congressional directives. However, without analyzing either the language or purposes of Section 8, as articulated by this Court in *California,* the Ninth Circuit stood *California* on its head when it concluded that "conversely, in the absence of congressional directives, DOI can regulate distribution, acquisition, and vested water rights if its regulations are not inconsistent with state law" (App. A-125). According to the Ninth Circuit under Section 10 of the Act, DOI may promulgate any rule it chooses concerning the acquisition and distribution of water, provided it follows state substantive law.

The Ninth Circuit's interpretation of Section 8 directly conflicts with *California. California* states that DOI must appropriate water in "strict conformity with state law" and that it is "abundantly clear" that Congress intended to defer to both the substance and form of state water law. By allowing DOI to establish its own form of water law, the Ninth Circuit requires neither conformity with state law, nor deference to its substance.

The decision is also at odds with the policy reasons stated in *California* for deference to both the substance and form of state water law. The policy articulated in *California* does not contemplate that DOI administer state water rights law by a set of redundant and parallel regulations. *California's* principles require that all state law matters of water rights, including matters of definition, administration and enforcement, be administered exclusively under state law processes. The only way to ensure consistency in water right administration and prevent the confu-

sion that will arise if federal and state water law "reigned side by side" is by following the principles established in *California*.

Accordingly, this Court should review the Ninth Circuit's decision to resolve its conflict with *California*.[1]

2. The Court Should Grant Review To Preserve The Deference To State Water Law Mandated By Congress In The Reclamation Act Of 1902

The relationship between Sections 8 and 10 of the Reclamation Act lies at the heart of the "cooperative federalism" envisioned and required by Congress in reclamation projects. It determines the extent to which DOI will give deference to state water law in the administration of the Reclamation Act. The Ninth Circuit decision misconstrues the meaning of the requirement in Section 8 that DOI "proceed in conformity" with state law and wholly overlooks its directive that the Reclamation Act not "in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." It fails to recognize that Section 8 is itself an "express congressional directive" which overrides the general administrative discretion provided by Section 10. In so doing the decision allows DOI to proceed in a manner not contemplated by state

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[1] In *California v. FERC*, ___ U.S. ___, No 89-333 (May 20, 1990), this Court upheld the Federal Energy Regulatory Commission's exclusive jurisdiction over hydroelectric power matters, and rejected California's attempt to assert duplicate authority over the issue of the appropriate minimum streamflows for a hydroelectric power project. In the course of its opinion, this Court re-affirmed its holding in *First Iowa Hydroelectric Cooperative v. FPC*, 328 U.S. 152, 171 (1946), which rejected "a dual system of futile duplication of two authorities over the same subject matter."

The Ninth Circuit's decision in the present case conflicts with this policy because it upholds a DOI regulation that would create exactly this type of "futile duplication of two authorities over the same subject matter." Review therefore also is proper to determine whether DOI's attempts to decide the same bench land/bottom land issues that the courts must decide should be rejected for the same reason that this Court rejected California's attempt to decide the minimum streamflow issue in *California v. FERC*.

law, thus interfering with state law and creating the very conflict which Congress sought to avoid.

The form or procedure established by a state for applying its substantive water law is as much a part of that law as the substantive law itself. Proceeding in conformity with state water law necessarily requires compliance with both the form and substance of that law. In addition, frequently, the state's substantive law consists of general principles which are given definition and meaning in a particular case by the entity or agency charged by the water law with rendering a decision. An attempt by DOI to establish procedures and criteria for defining and applying substantive principles of state water law necessarily involves an interference with state law.

For example, in Nevada the quantity of a water right is determined by the principle of beneficial use. Nev.Rev.Stat. § 533.035 (1989). The major conceptual tool for implementing beneficial use is water duty. *Alpine*, 697 F.2d at 854. The factors to be considered in determining water duty have been defined by those entities which Nevada law authorizes to make the determination. *See, Twaddle v. Winters*, 29 Nev. 88, 102-03, 85 P. 280 (1906).

There are two alternative procedures for quantification of water rights in Nevada: a proceeding before the Nevada State Engineer, or a judicial proceeding like *Alpine*. *See*, Nev.Rev.Stat. §§ 533.090 *et seq.*; 533.325 *et seq.*; 533.310 (1989); *Salmon River Canal Co. v. Bell Brand Ranches, Inc.*, 564 F.2d 1244, 1248-1249 (9th Cir. 1977). In contrast, there is *no* provision in Nevada law that allows DOI or any other water right holder to determine water duties by regulation, contract or in any other manner. Thus, by promulgating a rule which is intended to determine both the factors to be considered in and the procedure for establishing the water duties for specific lands, DOI has not "proceeded in conformity" with Nevada law and has interfered with Nevada law "relating to the control, appropriation, use [and] distribution of water used in irrigation" in direct violation of Section 8 of the Reclamation Act.

By making possible two forms of "state" water law reigning side by side in the same locality, the Ninth Circuit decision lays the foundation for precisely the "legal confusion" that *California* held that Section 8 was intended to avoid. For example, farmers on the Carson River adjacent to the Project will have their water duties determined by the *Alpine* Court, applying its criteria for distinguishing between bench and bottom land. On the other hand, farmers on the Project will have their water duties determined by DOI's application of its criteria, subject only to limited judicial review. The potential for confusion, conflict and inconsistency is apparent. Because of the interdependence of water rights on a stream system, all junior appropriators on the stream are affected by DOI's criteria and the application of that criteria. Determinations of water duties for lands within a reclamation project affect the amount of water upstream junior appropriators must allow to pass to the project and which a project must allow to pass to downstream junior appropriators. In light of the directive in Section 8 against interference with vested rights, Section 10 cannot be construed to authorize DOI to interfere with non-project water rights in this manner.

The potential for conflict and confusion created by the Ninth Circuit decision is not limited to the issue of water duty, to Nevada or to this Project. The potential for conflict and confusion extends to every substantive state water law issue, to every state with a reclamation project and to every reclamation project.

For example, under California law, the owner of a dam must allow sufficient water to pass through a dam "to keep in good condition any fish that may be planted or exist below the dam." Cal. Fish & Game Code § 5937 (West 1971). Indeed, one of the conditions imposed by the State Board in *California* related to that very issue. *See, United States v. State of California Water Resources Control Board,* 694 F.2d 1171, 1183 (9th Cir. 1982). The Ninth Circuit decision would allow DOI to promulgate its own process and criteria for determining the needs of fish below a reclamation project dam, while other dam owners on the same stream would be subject to proceedings before a California court or the California State Water Resources Control Board. *See e.g., California Trout, Inc. v. City of Los Angeles,* 207 Cal.App.3d 585,

255 Cal. Rptr. 184 (1989); *California Trout, Inc. v. Superior Court*, 218 Cal.App.3d 187, 266 Cal. Rptr. 788 (1990).

Another example relates to changes in existing water rights. Virtually every western state has established procedures for considering and general principles of substantive law concerning when and under what circumstances the point of diversion, place of use or manner of use of a water right may be changed. *See e.g.*, Ariz. Rev. Stat. Ann. § 45-172 (1987); Cal. Water Code §§ 1700 *et seq.* (West 1989); Colo.Rev.Stat. §§ 37-92-302, *et seq.* (1989); Ida. Code §§ 42-108; 42-222 (1989); Kan.Stat.Ann. § 82a708b (1989); Mont. Code Ann. § 85-2-402 (1989); Neb.Rev.Stat. § 46-250 (1988); Nev.Rev.Stat. § 533.345 (1989); N.M. Stat. Ann. §§ 72-5-3; 72-5-23; 72-5-24 (1985); N.D.Cent. Code § 61-04-15.1 (1985); Okla.Stat.Ann. tit. 82 §§ 105.22; 105.23 (West 1970); Or.Rev.Stat. §§ 540.520; 540.530 (1989); Utah Code Ann. § 73-3-3 (1989); Wash.Rev. Code Ann. §§ 90.03.380; 90.03.280 (1989); Wyo.Stat. § 41-3-104 (1977). The courts and decisions of state agencies charged with administering change applications have given definition and meaning to the general principles of state substantive law that existing water rights not be injured by a change. *See e.g., Kent v. Smith*, 62 Nev. 30,39, 140 P.2d 357 (1943); *Farmers Highline Canal & Reservoir Co. v. Wolff*, 131 P. 291, 294 (Colo. 1913); *Simonson v. Moon*, 237 P.2d 93, 97-98 (Ida. 1951).

The Ninth Circuit decision would allow DOI to establish change procedures by rule for reclamation projects, provided state substantive law governing changes is followed.[2] In addition, it would allow DOI to promulgate criteria defining the applicable general principles of state substantive law. Other water rights owners on the same stream would be subject to proceedings

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[2] Ironically, in *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983), another panel of the Ninth Circuit, relying on Section 8 of the Reclamation Act and this Court's decision in *California*, upheld a provision in the *Alpine* Decree requiring Project change applications to be processed in accordance with the procedures established under Nevada law. *See also, United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1223 (9th Cir. 1989).

before state agencies. Moreover, because of the interdependence of water rights on a single stream system, nonproject water rights owners would be affected by such changes and restricted in their ability to protect their rights in the context of a DOI change proceeding.

The water laws of most western states include prohibitions against waste of water. *See e.g.,* Ariz.Rev.Stat.Ann. § 45-112 (1987); Cal. Water Code §§ 100; 275 (West 1971); Colo.Rev.Stat. § 37-92-502 (1989); Kan.Stat.Ann. § 82a-706d (1989); Ida. Code § 42-1203 (1977); Mont. Code Ann. § 85-2-114 (1989); Neb.Rev.Stat. §§ 46-265; 46-266 (1988); Nev.Rev.Stat. §§ 533.045; 533.060 (1989); N.M.Stat.Ann. § 72-8-4 (1985); N.D.Cent. Code § 61-14-08 (1985); Okla.Stat.Ann. tit. 82 § 105.20 (West 1970); Or.Rev.Stat. §§ 540.720 (1989); Wash.Rev.Code Ann. § 90.03.400 (1962). As with other substantive principles of state water law, the rules against waste have been given meaning by the case law and entities charged with administering a state's water law. *See e.g., Doherty v. Pratt,* 34 Nev. 343, 124 P. 574 (1912); *Roeder v. Stein,* 23 Nev. 92, 42 P. 867 (1895); *Foster v. Foster,* 107 Ore. 355, 213 P. 895 (1923); *Basinger v. Taylor,* 36 Ida. 591, 211 P. 1085 (1922); *Erickson v. McLean,* 62 N.M. 264, 308 P.2d 983 (1957). Some states have established special enforcement procedures for preventing waste. *See e.g.,* Colo.Rev.Stat. § 37-92-502 (1989); Mont. Code Ann. § 85-2-114 (1989).

The Ninth Circuit decision would allow DOI to establish criteria for defining waste and to implement its own process for preventing it. Other water rights owners on the same stream would be subject to state proceedings and in addition would be affected by the DOI criteria and procedures.

In addition to authorizing parallel and overlapping water right determinations, the Ninth Circuit's decision has another serious flaw: it would allow DOI, one of many competing water users on a stream system, to make important determinations regarding the amounts of water available to other water users.

Allowing DOI to make such crucial determinations is particularly inappropriate here because of DOI's prior attempts to reduce

the water rights of Newlands Project farmers. In an effort to obtain more water for Pyramid Lake in *Alpine*, DOI argued that water duty limits contained in the contracts between project landowners and the United States should be construed as an administrative determination of the amount of water needed, and should therefore be accorded deference. The argument was rejected by the district court in that action. (App. A-14—A-17). The Ninth Circuit affirmed the district court's conclusion. It declined to recognize the Secretary' execution of water right contracts as a valid administrative determination of water duty. (App. A-38—A-41). In a similar effort in *Nevada*, the United States argued that a reallocation of water from the Project to Pyramid Lake was permissible. 463 U.S. at 121. Relying on Section 8 of the Reclamation Act, *Ickes v. Fox*, 300 U.S. 82 (1937), and *Nebraska v. Wyoming*, 325 U.S. 589 (1945), this Court said:

> In the light of these cases, we conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land. *Id.* at 126.

Here, DOI has attempted once again to shift Newlands Project water rights about as it sees fit for the benefit of Pyramid Lake, in total disregard for Section 8 of the Reclamation Act and this Court's opinion in *California v. United States*.

These are only a few examples of the conflict, confusion and interference with state water law which the Ninth Circuit decision allows. Review is necessary here to establish that DOI's general administrative powers under Section 10 do not displace state powers under Section 8. The Court should grant review to determine once and for all whether Congress intended to allow

separate state and federal processes for administering state water law to "reign side by side."

3. The Court Should Grant Review To Protect The Reserved And Inherent Jurisdiction Of Federal And State Courts To Interpret, Enforce And Apply Their Water Rights Decrees

This Court has consistently held that a court of equity has the power to carry its own orders, decrees and judgments into effect. Such a proceeding aids the original decree by carrying it to full execution or by providing directions upon some matter omitted by it. *See e.g., Root v. Woolworth*, 150 U.S. 401, 410-11 (1893); *Independent Coal & Coke Co. v. United States*, 274 U.S. 640, 647 (1927); *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934). This power is of particular importance in the context of comprehensive water right decrees which require continuous administration and which cannot possibly provide direction on or even anticipate every issue which may arise in the future concerning the administration of the decree.

Here, the two relevant federal court decrees specify the scope of the water rights for "bench" and "bottom" lands within the Newlands Project.[3] Moreover, although the decrees do not specifically designate the "bench" and "bottom" lands within the Project, the *Alpine* decree does contain criteria for future designations of "bench" and "bottom" lands (App. A-22), and the *Alpine* court's expressly reserved jurisdiction gives it the authority to make such designations (App. A-33).

The Ninth Circuit's decision improperly authorizes DOI to infringe on this reserved jurisdiction by making its own binding designations of "bench" and "bottom" lands. By according DOI's designations the status of "administrative regulations," the Ninth Circuit inescapably limits the district court's power to enforce its own contrary interpretations of its decree. Clearly, the district court, which used the terms "bench" and "bottom" land in its decree, which defined them in part, which retained broad author-

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[3] As the Ninth Circuit decision recognizes, a "great deal rides on these classifications (App. A-118). Farmers owning 11,000 acres will have their water supply reduced by nearly 25% as a result of DOI's rule.

ity to resolve disputes concerning the distribution of water, and which reserved continuing jurisdiction to add to the decree, should have full and unfettered authority to further define and apply those terms of its decree.

The decision of the Ninth Circuit limiting that authority creates a situation that is intolerable in federal equity jurisprudence. Unless reversed by this Court, the decision below will seriously erode the powers of the federal judiciary in all equity cases involving federal administrative agencies with general rulemaking authority.

The principle that, by rule, DOI may define and give meaning to provisions in comprehensive water right decrees which apply to reclamation projects, will have serious consequences throughout the West. Such decrees are common in the West and involve the water rights of thousands of persons both on and off reclamation projects. *See e.g., United States v. District Court For Water Div.* No. 5, 401 U.S. 527 (1971); *United States v. New Mexico*, 438 U.S. 696 (1978). The water laws of many Western states expressly provide for court adjudication of stream systems. *See e.g.*, Ariz.Rev.Stat.Ann. §§ 45-252 *et seq.* (1987); Cal. Water Code §§ 2500-2900 (West 1989); Colo.Rev.Stat. §§§ 37-92-101 *et seq.* (1989); Ida. Code §§ 42-1406 *et seq.* (1989); Mont. Code Ann. §§ 85-2-21 *et seq.* (1989); N.M.Stat.Ann. §§ 72-4-17 *et seq.* (1985); Okla.Stat.Ann. tit. 82 §§ 105.6 *et seq.* (West 1970); Or.Rev.Stat. §§ 541.310 *et seq.* (1989); Utah Code Ann. §§ 73-4-1 *et seq.* (1989); Wash. Rev.Code Ann. §§ 90.03.110 *et seq.* (1989). Because water rights on a stream system are interdependent, DOI's rules with respect to Court decrees will affect non-project water right owners as well as project water right owners.

The Court should grant review to determine whether and, if so, the extent to which, DOI may interfere with the power of water rights courts to interpret, apply and enforce their decrees.

CONCLUSION

For each of the reasons above, Petitioners respectfully request the Court to issue the writ of certiorari and to reverse the Ninth Circuit's decision in this matter.

Respectfully submitted,

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(Appendices to follow)

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Appendix A

The United States of America,
Plaintiff,

v.

Alpine Land & Reservoir Company,
a corporation et al., Defendants.

Civ. No. D-183 BRT.

United States District Court,
D. Nevada.

Oct. 28, 1980.

OPINION

BRUCE R. THOMPSON, District Judge.

This is a quiet title suit to adjudicate the rights to the use of the water of Carson River in Nevada and California. The case was tried before the Court and John V. Mueller, a Special Master, the Master having heretofore submitted proposed findings of fact, conclusions of law and decree. Objections to the Master's report have been filed by the parties and further trial proceedings to resolve those objections have been held before the Court as provided by the proposed preliminary pretrial order heretofore filed and approved by the Court on October 20, 1977.

This Court has jurisdiction over this matter under 28 U.S.C. § 1345 and the Act of September 19, 1922, 42 Stat. 849. The question of the jurisdiction of the Court over successors in interest to the original defendants, including those in California, was briefed. On February 15, 1974, the Court concluded in open court:

> that the Court does continue to have jurisdiction over the successors in interest of all parties who were originally parties to this litigation.

As provided in the proposed preliminary pre-trial order, the proposed Mueller findings of fact, conclusions of law and decree, submitted in June 1951 and later amended, shall, except where modified and supplemented in resolving the issues hereinafter set

out, constitute the final findings of fact, conclusions of law and decree in this case.

The following is the Court's opinion regarding various issues of law and fact and mixed law and fact covered by the evidence received and the extensive briefs of the parties. If certain contentions made or issues stated in the pre-trial orders are not discussed, they are considered irrelevant.

THE WATER RIGHTS FROM THE UNITED STATES' APPROPRIATION FOR THE NEWLANDS PROJECT.

The water rights on the Newlands Project covered by approved water right applications and contracts are appurtenant to the land irrigated and are owned by the individual land owners in the Project. These rights have a priority of July 2, 1902. The United States may have title to the irrigation works, but as to the appurtenant water rights it maintains only a lien-holder's interest to secure repayment of the project construction costs.

Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 372, states:

> "The right to the use of water acquired under the provisions of this Act [5 § 485, §§ 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 439, 461, 491, 498 of this title] shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

43 U.S.C. § 542 states:

> "Every patent and water-right certificate issued under this Act [§§ 541-546 of this title] shall expressly reserve to the United States a prior lien on the land patented or for which water right is certified, together with all water rights *appurtenant* or belonging thereto . . . " (Emphasis added.)

Furthermore, 43 U.S.C. § 498 empowers the Secretary of the Interior to transfer the operation and management of irrigation works to project landowners once payments for a major portion of the project lands are made. Section 498 specifically states that despite any transfer of operation and management responsibilities, title to the reservoirs and works remains in the government. The

lack of mention of water right title in this section implies that title to the water right had already passed to the farmers with their land patents. The Supreme Court discussed the Reclamation Act in conjunction with the western doctrine of appropriative water rights in *Ickes v. Fox*, 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937). The Court emphatically stated that although the government diverted, stored and distributed the water, the ownership of the water or water rights did not vest in the United States. "Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners . . . " Id. at 95, 57 S.Ct. at 416. Thus any property right of the government in the irrigation works is separate and distinct from the property right of the land owners in the water right itself. In *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978), the Court concluded, after an extensive survey of the older cases and the legislative history of the Reclamation Act, that state law was supposed to control the Act in two major ways:

> "First . . . the Secretary would have to appropriate, purchase or condemn necessary water rights in strict conformity with state law.
>
> * * *
>
> "Second, once the waters were released from the dam, their distribution to individual landowners would again be controlled by state law."

Id. at 665-7, 98 S.Ct. at 2996. In all the arid states, including Nevada, it is settled state law that the right to use water is acquired by an appropriation to some beneficial use. In *Fox* the court held that this type of right is a property right, which, "when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied." 300 U.S. at 95-6, 57 S.Ct. at 416-17.

In *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945), the court reiterated the *Fox* analysis, once more defeating the government's claim to project water rights. More recently, in the *California* case, the court pointed out that

an important unifying factor in the long working relationship between the United States and the several arid western states in the area of reclamation projects is the "purposeful and continued deference to state water law by Congress." *California v. United States*, id. at 653, 98 S.Ct. at 2989. The only area where state law may not control is where it conflicts with explicit congressional directives in the Reclamation Act, a concern not relevant to this case. It cannot be disputed that under Nevada's appropriative water right statutes the water appropriated and beneficially used on the land is appurtenant to that land and those water rights are owned by the land owner.

The United States relies upon *Ide v. United States*, 263 U.S. 497, 44 S.Ct. 182, 68 L.Ed. 407 (1924), and *United States v. Humboldt Lovelock Irrigation Light & Power Co.*, 97 F.2d 38 (9th Cir. 1938), as supporting its claim to title to the project water rights. These cases reveal little, if any, support for the government's position. The plaintiff land owners in *Ide* had acquired parcels of a former school site owned by the state of Wyoming but located in the midst of a federal reclamation project. These land owners got patents from Wyoming with no water rights; the surrounding lands were sold to farmers by the federal government with a project water right. The plaintiff land owners, all of whom got patents from Wyoming, attempted to assert appropriation of seepage water from the irrigation of the surrounding project lands.

In discussing the general nature of the entire project, the court clearly stated that a water right vests in the holder of a project land patent from the federal government. "The lands are disposed of in small tracts . . . each disposal carrying with it a perpetual right to water from project canals." *Ide v. United States* at 499, 44 S.Ct. at 182. The court held that there could be no appropriation of the seepage water because, although the federal government passed water rights with the project land patents, it did not give up all incidents of control, and so could collect and redistribute seepage water as against the land owners with Wyoming patents and no original project water rights. This holding is merely a slightly different way of stating what was said in *Fox*, that the government diverts, stores and distributes water but the project

farmers with government patents, not the government itself, have title to the water right.

In *United States v. Humboldt Lovelock Irrigation Light & Power Co.*, the question was whether a motion to dismiss for failure to state facts sufficient to constitute a cause of suit was proper where the United States sought an injunction against a private reservoir company to prevent diversions of water allegedly in violation of earlier priorities owned by the government. The government owned no land; the defendant maintained that the government could own no water rights without owning land, and thus that the government did not state facts establishing a property right. The water rights in question had originally been appurtenant to private irrigated lands and had been conveyed to the United States by the private owners. The appellate court held that the relevant Nevada statute "authorizes conveyance to, and ownership by, appellant (United States) of the water rights in question, regardless of whether it does or does not own land to be irrigated." *United States v. Humboldt Lovelock Irrigation Light & Power Co.*, at 45. The appellate court also quoted with approval from *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 140 P. 720, 144 P. 744 to the effect: "a water right for agricultural purposes, to be available and effective, must be attached to the land and become in a sense appurtenant thereto by actual application." (at p. 43). The essence of the decision in the case is that the United States had sufficient interest in the water rights to have standing to maintain the suit.

This case is thus of little relevance to the present problem since it is not disputed here that water rights can be conveyed to the United States or that the United States can own water rights. Rather, the issue here is what happened to the water rights after they were properly acquired by the United States. The United States passed title to the water rights to the project, farmers and the rights are appurtenant to the land irrigated.

IS THE CARSON RIVER THE PRIMARY SOURCE OF WATER FOR THE CARSON DIVISION OF THE NEWLANDS PROJECT?

The parties have in the pre-trial order stated the foregoing as an issue. It is not easily understood why an answer is needed. Lake Lahontan is serviced by the Carson River and by diversions from the Truckee River through the Truckee Canal. Obviously, all Carson River water which reaches the Lahontan Reservoir is captured and stored there. Under section 8 of the Reclamation Act of 1902 (43 U.S.C. § 372), the Nevada statute (N.R.S. 533.035), and all applicable judicial precedent, beneficial use is the basis, the measure and the limit of a water right. Hence, additonal water diverted through the Truckee Canal is limited to the amount required for beneficial use. While Claim No. 3 on page 10 of the Truckee River Final Decree grants to the United States the right to divert 1,500 cubic feet per second of water flowing in the Truckee River for use on the Newlands Project, the Truckee River Decree itself, on page 87, expresses the beneficial use limitation as follows: "Except as herein specially provided no diversion of water into any ditch or canal in this decree mentioned shall be permitted except in such amount as shall be actually, reasonably necessary for the economical and beneficial use for which the right of diversion is determined and established by this decree."

THE VESTED RIGHTS ACQUIRED BY PURCHASE BY THE UNITED STATES.

In the early stages of the Newlands Project the United States acquired by contract the vested water rights to 29,884 acres of land with priority dates ranging from 1865 to 1902. These rights were conveyed to the United States by private land owners in exchange for the government's promise to deliver Project water to these farms.

The defendant upstream users make three separate arguments in regard to these rights. First, the defendants contend that it is physically impossible to bring water down the river during low flow periods to satisfy these earlier priorities in derogation of later priorities upstream from the Project; water decrees must be

practical and there is no point in adjudicating a right which cannot physically be satisfied. Second, the defendants argue that since the United States has never actually asserted or used these rights with an identity separate from the rest of the Project water,[1] the separate title to these rights has been abandoned or forfeited. Third, the defendants assert that, since the United States failed to make applications to change the place of diversion and place of use pursuant to state law, the claimed rights have been forfeited.

A. *Impossibility.*

The upstream defendants assert that these rights should not be adjudicated since it is physically impossible to assert the claimed earlier priorities in derogation of junior priorities located upstream. Regardless of the validity of this argument, the defendants ignore the possibility that the United States may assert these rights against others in the Newlands Project. For example, if the TCID wanted to drain the reservoir entirely in order to satisfy the farmers' 1902 irrigation priority, the United States could prevent that drainage to the extent of its assigned priorities date before 1902. Thus the rights in question are not merely illusory or paper rights; the adjudication of these rights can have an impact on the parties and the course of events on the river.

B. *Failure to Assert the Rights Separately.*

The defendants' argument that the United States has failed to assert the vested right with a separate identity is equivalent to the argument that the United States has failed to beneficially use the water. *United States v. Humboldt Lovelock Irrigation Light & Power Co.* holds that the United States may own a water right regardless of whether or not it owns irrigable land. In *Humboldt,* however, the question was not whether the United States has failed to beneficially apply water under a water right; rather the question was whether the United States had stated a property right sufficient to sustain a cause of action where private parties had transferred water rights to the United States and the United States owned no irrigable land. This distinction is crucial to the

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[1] All the waters of the Carson are diverted at the same place by the Lahontan Dam and thus are commingled for storage and distribution.

present problem. It is not disputed that the United States may validly acquire a water right. The questions here are: assuming the rights to be properly acquired, has the United States used these rights beneficially, and, if not, then what are the consequences?

The United States owns lands within the Newlands Project. Referred to in this case generally as the Carson Pasture area and the Stillwater area, these lands comprise some 17,000 to 20,000 acres. Testimony indicated that these areas receive water largely from drainage or seepage from Project farms and very occasionally from direct flows. The amount of land actually irrigated varies greatly from year to year depending on the avaliable water. The United States specificially denies that it claims or holds any direct water right for the federally owned land in the Project.

An issue is stated on page 6 of the approved pretrial order as follows:

> "9. Do the Carson Pasture and other custodial lands have a water right and, if so, what is their priority?
>
> "The parties agree that the Carson pasture and other pasture lands within the project have an irrigation water right with a priority of July 2, 1902."

The foregoing is not a stipulation that the pasture lands are entitled to direct diversion from the Carson River of water for the irrigation of the pasture lands with a specific acre foot per acre duty. It is a recoginition of an historic condition, that is, that the pasture lands are entitled to the use of whatever waters flow from the lower portion of the Project vested right lands to the exclusion of anyone who might seek to appropriate the waters for other uses.

The United States asserts that the federally owned lands are entitled only to receive whatever quantity of drainage water flows off the bottom of the Project. Additionally, the United States points to the contract executed in 1926 between the Truckee-Carson Irrigation District and the United States wherein the United States turned over operation and management of the Project to the District. Paragraph 35 of this contract prohibits the delivery of water "to lands other than vested right land . . . " The United States, then not only does not claim a water right for these

lands but strongly argues *against* any entitlement to direct flows. Under these circumstances, the United States had never used its purchased and appropriated rights beneficially on the federally owned land in the Project and has represented to this court that it does not claim *any* vested right as to that land.

The failure to beneficially use the water for irrigation purposes does not end the problem, however. There are other beneficial uses to which water can be applied; among these other uses are fishing and public recreation. *State ex rel. State Game Commission v. Red River Valley Co.*, 51 N.M, 207, 182 P.2d 421 (1945); *Surface Creek Ditch & Reservoir Co. v. Grand Mesa Resort Co.*, 114 Colo. 543, 168 P.2d 906 (Colo.S.Ct. en banc, 1946); *State, Department of Parks v. Idaho Department of Water Administration*, 96 Idaho 440, 530 P.2d 924 (1974); *Brasher v. Gibson*, 2 Ariz. App. 91, 406 P.2d 441, vacated on other grds. 101 Ariz. 326, 419 P.2d 505 (1966); Clark, "Waters and Water Rights" 1967 Ed. Vol. 1, p. 375. The Nevada legislature has expressley declared "any recreational purpose" to be a beneficial use of water. N.R.S. 533.030, 1969 St. 141. A similar statute was interpreted by the Arizona Court of Appeals in *McClellan v. Jantzen*, 26 Ariz. App. 223, 547 P.2d 494 (1976) which commented as follows:

> "Originally, the concept of 'appropriaton of waters' consisted of the diversion of that water with the intent to appropriate it and put it to a beneficial use. *Arizona v. California*, 283 U.S. 423, 51 S.Ct. 522, 75 L.Ed. 1154 (1931). Being the first to have properly performed these functions, the appropiator acquired a vested right to the use of these waters as against the world, which could not be taken from him except by his consent. *Gila Water Co. v. Green*, 27 Ariz. 318, 232 P.1016 (1925), modified in 29 Ariz. 304, 241 P. 307 (1925); *Adams v. Salt River Valley Water Users Ass'n.*, 53 Ariz. 374, 89 P.2d 1060 (1939). The concept of diversion to effect the beneficial use was consistent with the stated purposes for which an appropriation could be made prior to 1941, that is, domestic, municipal irrigation, stock watering, water power and mining. However, in 1941 when 'wildlife, including fish' and in 1962 when 'recreation' were added to the purposes for appropriation, the

> concept of *in situ* appropriation of water was introduced—it appearing to us that these purposes could be enjoyed without a diversion. We find nothing, however, which could indicate that the legislature intended that such an *in situ* appropriation would not carry with it the exclusive vested rights to use the waters for these purposes. We therefore find that by these amendments the legislature intended to grant a vested right to the State of Arizona to subject unappropriated waters exclusivley to the use of recreation and fishing. Conceivably then, and assuming a first in right appropriation, the Game & Fish Department could prohibit the draining of a lake for irrigation purposes for example, if that draining interfered with the fish therein. This obtaining of a vested right to use the water for fish is to be contrasted with the statutory authority vested in the Department by A.R.S. § 17-231 (B) (6) allowing it to stock fish in public and private waters."

Inasmuch as the concept of *in situ* appropriation of water to a beneficial use had been recognized by the Nevada Supreme Court long prior to the 1969 statutory amendment (*Steptoe Live Stock Co. v. Gulley,* 53 Nev. 163, 295 P. 772 (1931)) we have no difficulty in recognizing recreation and fishing and beneficial uses of water.

The Court takes judicial notice of the fact that fishing and public recreation have taken place on Lahontan Reservoir virtually since the construction of the dam. Thus the water has been beneficially used and the United States has not abandoned or forfeited these rights.

C. *Failure to Make Change Applications.*

In general, the United States is required to conform to applicable state water law in carrying out the Reclamation Act. Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383 provides in pertinent part:

> "Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior,

> in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . ."

As previously discussed, in construing the Reclamation Act the Supreme Court has held that state law was meant to control the Act unless in conflict with explicit congressional directives in the Act. *California v. United States, supra. See also, United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950); *Nebraska v. Wyoming supra; California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164 n.2, 55 S.Ct. 725, 731 n.2, 79 L.Ed. 1356 (1935); *United States v. District Court of Fourth Judicial District in and for Utah County*, 121 Utah 1, 238 P.2d 1132 (1951).

A careful examination of the Reclamation Act reveals no explicit congressional directives relating to the transfer of vested water rights to the United States. In fact, the conspicuous absence of transfer procedures, taken in conjunction with the clear general deference to state water law, impels the conclusion that Congress intended transfers to be subject to state water law. Thus, the United States was and is required to conform to applicable Nevada law with respect to changing the place of diversion or place of use.

The defendants assert that in failing to make change applications the United States has forfeited the claimed rights. An examination of the contracts reveals widely varying dates of agreement. Of the eighty contracts totaling 29,884 acres of water rights, there are eleven contracts covering a total of 9,045 acres that are dated after 1913 and sixty-nine contracts covering a total of 20,839 acres of water rights dated before 1913. It was in 1913 that Nevada's appropriative surface water right scheme (now Chapter 533 N.R.S.) was enacted.

As far as the pre-1913 contracts are concerned, they are governed by the Nevada case law existing before the enactment of the statutory scheme. *See* N.R.S. 533.085 [84:140:1913; 1919 RL p. 3247; N.C.L. § 7970]; *Humboldt Land & Cattle Co. v. Allen*, 14 F.2d 650, 653 (9th Cir. 1926). This Court can find no requirement in the pre-1913 common law for notices of, or applications for, changes in the place of diversion or place of use

for water rights vested and transferred prior to 1913. Indeed, *Union Mill & Mining Co. v. Dangberg,* 81 F. 73 (C.C.D.Nev.1897), directly holds that the place of diversion or place of use may be changed at any time as long as other rights are not injured. Therefore there could be no penalty as to those rights for failure to make the change applications.

As to the post-1913 contracts, even were the Court to agree with the requirement that the government make change applications, a failure to do so would only incur a loss of priority date, not a complete forfeiture of the right. *See* N.R.S. 533.040 [4:140:1913; 1919 RL p. 3225; N.C.L. § 7893] and 533.325 [59:140:1913; A 1919, 71; 1951, 132]. However, the Court does not agree that the government was even required to make change applications. The entire plan for the Project was formulated around 1902 and many of the contract rights were acquired in 1906 and 1907. The United States is entitled to carry out and complete the Project under the Nevada law as it existed when the Project plan was formulated and activity commenced. Thus the intervening enactment of Nevada's statutory water code should not be used to destroy the priorities of rights acquired by the United States pursuant to completion of the original plan.

The comments in the Congressional Record during the passage of the Reclamation Act, cited in *California v. United States, supra,* 438 U.S. at pp. 665, 666 and 668, 98 S.Ct. at pp. 2996, 2997, indicate that a major factor in the Secretary's decision on the feasibility of a reclamation project was to be the status of relevant state water law. It would be unfair to allow the government to make decisions based on the applicable state law at the time the project was authorized and commence action on an enormously expensive project and then allow the state to change the rules for the government in midstream. For the Newlands Project the applicable Nevada law was the state water law as it existed in 1902. Of course now that the Project has been completed for many years, the government is subject to all the strictures of the state law as discussed in *California v. United States, supra.* The defendants' argument that the failure to make change applications has an effect on the government's water rights is meritless.

THE WATER DUTIES FOR THE WATER RIGHTS ON THE NEWLANDS PROJECT AND BELOW LAHONTAN.

This section deals with the duty for the privately owned Project farmlands, and the duty for the United States' right for fishing and recreation on the Lahontan Reservoir.

A. *Water Duties for the Project Farmlands.*

The arguments as to these duties can be separated into legal contentions and evidentiary or factual contentions. The legal contentions concern alleged limitations on the farmland duties resulting from contractual agreements and from Nevada's State Cooperative Act of 1903. The factual contentions concern what is the proper amount of water reasonably necessary to grow alfalfa on the Project farms.

(1) *Legal Arguments.* Section 2 of the State Cooperative Act of 1903 limited:

> "the quantity of water which may be appropriated or used for irrigation purposes in the State of Nevada [to] . . . three acre feet per year for each acre of land supplied." (1903 Nev.Stats. Chap. IV, § 2)

This very section of the Act was singled out for repeal two years later in 1905 Nev.Stats. Chap. XLVI, § 1. Nonetheless, the United States argues that this section limits all rights obtained on the Newlands Project to three acre feet per acre.

The United States, as well as the other parties, stipulated before trial that the priority date for the Newlands irrigation rights is July 2, 1902. It is difficult to see how the 1903 Cooperative Act could constitutionally limit or impair rights in existence prior to 1903. The United States, however, argues that the July 2, 1902 priority date is arrived at by the doctrine of relation back and the Secretary did not actually claim the water right until May 26, 1903; the rights are therefore said *not* to have been in existence before the enactment of the 1903 Act.

This theory fails because the United States seriously misapprehends the doctrine of relation back. This doctrine does not pick the date of priority out of thin air; the date of priority is the date

that work commenced on an appropriation. The nature of a water right is such that it takes time to perfect the right. It may, in fact, take years of diligent work to build dams, ditches and canals, clear and prepare fields and finally use the water to grow crops on those fields.

The doctrine of relation back tells an appropriator that if the work of appropriation is pursued diligently, the date of priority will be the date work was commenced, not the date of application or the date of perfection. The Nevada Supreme Court has stated:

> "[w]hen any work is necessary to be done to complete the appropriation, the law gives the claimant a reasonable time within which to do it, and although the appropriation is not deemed complete until the actual diversion or use of water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it."

Ophir Mining Co. v. Carpenter, 4 Nev. 534 at 543-44 (1869). *See also Farmers' High Line Canal & Reservoir Co. v. Southworth,* 13 Colo. 111, 21 P. 1028 at 1029 (1889); *Nevada Ditch Co. vs. Bennett,* 30 Or. 59, 45 P. 472 at 480 (1896).

In stipulating to the 1902 priority, the parties have agreed that the first steps were taken to secure these rights in 1902. The date that the Secretary formally claimed the rights is irrelevant. Upon the diligent perfection of these rights, the law recognizes that the rights have been in existence since 1902 and the 1903 Cooperative Act cannot limit the rights to three acre feet per acre.

Furthermore, the repeal of the limiting section of the Act is significant. In the absence of legislative history, it would at least be arguable that the repeal of Section 2 of the 1903 Act and the subsequent enactment of what is now N.R.S. 533.035 (beneficial use shall be the basis, the measure and the limit of the right to the use of water) represents a legislative judgment that a specific limitation was ill-advised under the varying conditions of climate and soil in Nevada.

The United States makes the additional legal argument that certain of the Project farmlands are limited by contract to a water

right of three acre-feet per acre. A number of representative contracts were put into evidence as Exhibit 38. These are all contracts between the United States and private landholders for the delivery of water from the Reclamation Project. Some of the contracts contain no specific acre foot limitation, but rather refer to "an amount necessary for the proper irrigation" of X acres, or the "quantity of water which shall be beneficially used for the irrigation" of the lands in question. These contracts are not at issue.

Those at issue are the contracts covering some 42,447 acres in which a specific acre foot limitation is expressed. Representative of these contracts are the contract between Oswald J. Leet and the United States, and that between Julius M. Christensen and the United States. Mr. Leet's contract states:

> "II. That the party of the second part hereby agrees to deliver without charge except as hereinafter provided and free of all cost or charge for building the irrigation works, water not exceeding three (3) acre-feet per acre for the proper irrigation of seventy-six (76) acres of land. . . ."

Mr. Christensen's contract states:

> "2. The quantitive measure of the water right hereby applied for is that quantity of water which shall be beneficially used for the irrigation of said irrigable lands up to, but not exceeding three acre-feet per acre per annum, measured at the land; and in no case exceeding the share, proportionate to irrigable acreage, of the water supply actually available as determined by the Project Engineer or other proper officers of the United States, or of its successors in the control of the project, during the irrigation season for the irrigation of lands under said unit."

The United States maintains that these types of contracts limit those 42,447 acres to a maximum duty of three acre-feet per acre. The defendants argue that reasonable beneficial use is the measure and limit of their rights regardless of the contract language.

A similar problem arose in the state of Washington in connection with the Sunnyside Division of the Yakima Project. There,

the farmers had various contracts with the government, some of which expressed a three acre-foot limitation. The contract language provided:

> "the quantity of water to be furnished hereunder shall be 3 acre feet per acre of water per annum per acre of irrigable land, . . . measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; Provided, That the supply furnished shall be limited to the amount of water beneficially used on said irrigable land . . . "

Lawrence v. Southard, 192 Wash. 287, 73 P.2d 722, 723 (1937). The Secreatry of the Interior attempted to limit the Sunnyside farmers to 3 acre-feet under all the contracts except that the farmers could rent more water for an additional charge beyond the original payment for the Project's construction costs. The conflict over the Secretary's attempted action resulted in years of lawsuits. The cases of *Lawrence v. Southard, Ickes v. Fox,* 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937), and *Fox v. Ickes*, 137 F.2d 30 (1943) all deal with the question of whether the Secretary could limit the water supplied under the contracts to 3 acre-feet per acre and charge an additional fee for water above that amount.

In *Ickes v. Fox*, the Supreme Court engaged in a lengthy explication of the Reclamation Act in holding that the United States was not an indispensable party to an action against the Secretary of the Interior to set aside his orders limiting farmers' contract water rights to 3 acre-feet per acre. There followed a trial on the merits of the claims which was appealed in *Fox v. Ickes.* The District of Columbia Court of Appeals held that: "[r]eading the Reclamation Act in the light of the decision in *Ickes v. Fox,* we find the situation in this case to be as follows: The water rights of appellants are not determined by contract but by beneficial use." *Fox v. Ickes,* 137 F.2d at 33; and that "the water rights here are not based upon the construction or enforcement of contracts with the government." Id. at 35.

Similarly, the Supreme Court of Washington held that beneficial use determined the water right and that the "order of the

Secretary of the Interior under date of October 17, 1930 limiting the water right to 3 acre-feet is a nullity. That order was not authorized by Congress." *Lawrence v. Southard,* 192 Wash. 287, 73 P.2d 722 at 728. Although these cases also involved issues as to prescriptive rights and the validity of appropriations, the holdings as to the contractual limitations stand on their own.

The United States argues that the contract language in our case is so different that the above authorities do not apply. This argument is meritless. Although the exact wording of the contracts in our case is not the same as in the Yakima Project contracts, the attempt to limit the water right to 3 acre-feet is exactly the same. The discussion in *Fox v. Ickes* is not so much a close examination of the contract language as it is a broad statement that the limit of water rights is beneficial use, not specific contractual limitations.

This Court finds the reasoning in *Fox* and *Lawrence* persuasive. Even more explicitly, it appears that the Secretary not only acted without authority from Congress in inserting a specific acre-foot limitation in the contracts, but acted in clear contravention of Congressional intent. Section 8 of the Reclamation Act, 43 U.S.C. § 372, states that as to water rights acquired under the Act, "beneficial use shall be the basis, the measure, and the limit of the right." Congress' intent could neither be more clear nor more specific. The contractual limitation to 3 acre-feet per acre could only be authorized if that amount were the amount required for beneficial use. Since this Court finds that the amount required for beneficial use exceeds 3 acre-feet, the contractual limitations thwarts the Congressional intent of the Reclamation Act and is without any legal effect on the defendants' water rights. Cf. *United States v. Joyce,* 240 F. 610 (8th Cir. 1917); *United States v. Washington,* 233 F.2d 811 (9th Cir. 1956) (the requirements of acts of Congress must be read into and are automatically part of the conveyances of land by patents which have ignored such requirements.)

2. *Evidentiary Contentions.*

(a) Water Duty. One of the central tasks in this case is to establish a clear and specific water duty for both the Newlands

Project farmlands and the upper Carson farmlands. Because of the mechanism adopted by the court with regard to changes in place or manner of use of the water rights, specific findings must also be made as to the consumptive use.

Alfalfa is by far the dominant crop grown on the lands in question in this case. Because of the relatively short growing season and other weather conditions in this part of the state, alfalfa is one of the few cash crops the Carson River farmlands can support.

Relying on *Farmer's Highline Canal & Reservoir Co. v. Golden*, 129 Colo. 575, 272 P.2d 629 (1954), the United States argues that a water duty should be based on historical production. This Court's interpretation of that decision, however, is that the Colorado court based the water duty on the *kind or type* of crops historically grown on the lands—not the *amount* of crops historically grown. In other words, if the farmers have been growing sugar beets, the water duty will be the amount of water reasonably necessary to grow sugar beets, not the water needed for onions or avocados. In this case, alfalfa is the crop historically grown on the lands in question and under Nevada law and the Reclamation Act, the water duty for these lands is that amount of water reasonably necessary to grow alfalfa.

The United States presented lengthy expert testimony to the effect that a water duty of 3 acre-feet per acre applied to the land should be reasonably sufficient to grow alfalfa on all the Project farmlands. The defendants presented equally lengthy expert testimony to the effect that a water duty of at least 3.5 acre-feet per acre applied to the land should be reasonably sufficient to grow alfalfa on the bottom lands in the Project and at least 4.5 acre-feet per acre applied to the land should be reasonably sufficient to grow alfalfa on the bench lands in the Project.

After examination and comparison of the expert evidence, particulary with regard to conveyance efficiency, on-farm efficiency, soil slope and character, weather and consumptive use, the Court finds the defendants' expert evidence more credible. As a result, the Court finds that the water duty for farmlands on the Newlands Project is 3.5 acre-feet per acre applied to the land on

the bottom lands and 4.5 acre-fet per acre applied to the land on the benchlands subject always to the limitation of benefical use.

(b) Consumptive Use. The water duty is the amount of water required to properly irrigate the farmlands. This duty differs depending on physical conditions. For example, in parts of the upper valley, the ground is so steep and the soil character is such that a relatively high duty is required for proper irrigation. Differing water duties do not imply that the alfalfa *uses* different amounts of water, however. In an area such as Western Nevada a certain amount of water is needed to irrigate the land, but some lesser quantity is actually consumed by the crop growth. This section addresses the issue of how much water is actually consumed in growing a ton of alfalfa on an acre of land in the Newlands Project area.

Both plaintiff and defendants presented considerable expert testimony as to lysimeter test results, actual commercial yields, lysimeter yields, and effective rainfall. There was a great deal of conflict over the proper interpretation of the lysimeter data. The most credible evidence indicates that the lysimeter yields have to be adjusted to reflect actual field conditions when estimating actual consumptive use. Because of the factors described by the defendants' experts, the actual commercial yields tend to average some 30% below lysimeter yields. The average production on the Newlands Project farms over the ten-year period from 1969-1978 is about 5 tons per acre. The lysimeter evidence showed that 6 inches of water is required per ton; the total actual consumption figure is therefore 3.25 acre-feet per acre after the lysimeter data is adjusted for production under actual field conditions. Since this case concerns the consumption of surface water from the Carson River, effective rainfall must be deducted from the total consumption figure. The evidence showed that the effective rainfall is 0.26 acre-feet. Therefore, the consumption use of irrigation water is 2.99 acre-feet per acre for the Newlands Project.

B. *Water Duty for the Fishing and Recreation Rights.*

The water stored in the Lahontan Reservoir for irrigation rights also functions coincidentally to provide water for fishing and

recreation. The question here is: to how much water is the United States entitled for supplying the uses of fishing and recreation?

In the irrigation of crops there is an absolute upper limit to how much water can be applied; productivity drops or the crops may even drown if over-watered. Unlike irrigation, there is no apparent practical limit to the water that can be used for fishing and recreation; the more water there is, the more room there is for fish, boats and swimmers. The only physical limitation at the reservoir would be the capacity of the site. Since, however, water is such a scarce resource in this state and there are so many competing demands on the limited supply of water, each use can be assigned only the ***minimum*** reasonably required for that use. The evidence in this case indicates that the minimum amount of water that must be retained in the reservoir to support the fish habitat and provide swimming and boating areas is some 20,000 to 30,000 acre-feet. Therefore this Court finds tht the duty for the United States' fishing and recreation right is 30,000 acre feet.

THE WATER DUTIES AND IRRIGATION SEASON FOR LANDS ABOVE THE LAHONTAN REGION.

The lands upriver from the Newlands Project consist largely of the Carson Valley and Alpine County farmlands with some smaller acreages between Carson City and the Lahontan Reservoir.

A. *Irrigation Season.*

All parties agree that the Federal Water Master should determine the irrigation season.

B *Water Duties.*

The United States asserts that in the Carson Valley portion of the river the Court should not only find water duties and consumptive use figures, but also should adopt the so-called historical depletion approach. The essence of this idea is that measurements are available from gauges on each fork of the Carson as it enters the valley and from the river gauge as it exits the valley. The government urges the Court to use the historical data and subtract outflows from inflows to obtain an average historical depletion or disappearance of water in the Carson Valley. The

government suggests that the Carson Valley users not be allowed to exceed this average historical depletion level and that the Federal Water Master enforce the restriction. The United States cites *United States v. Gila Valley Irrigation District,* Globe Equity No. 59 (D.Ariz., June 29, 1935) as authority for the use of the historical depletion approach.

In *Gila Valley,* the court set a permissible irrigation season consumptive use of 120,000 acre-feet for the upper valleys and held that the consumptive use would be determined by adding the recorded inflows from gauging stations located on the San Francisco River and on the Gila River at Red Rock Box Cannon and subtracting the outflow from a gauging station on the Gila River near Calva, Arizona. This method of measurement was adopted "as sufficiently accurate for practical purposes and as better suited for administering (the) decree than any more refined method of determining actual consumptive use." Id. at 107.

For the very reasons the Arizona court adopted the depletion approach, this Court rejects it. The conditions in the Carson Valley indicate that the use of only two inflow measuring points would be inaccurate. Unlike the semi-arid surroundings of the Gila River Valley, the Carson Valley is bounded on the west by the Sierra Nevada mountains and on the east by the Pinenut Range. The evidence showed that both mountain ranges can contribute substantial water flows from springs, creeks and snow melt; all of this water flows directly into the valley downstream from the inflow measuring gauges and is thus unmeasured. Furthermore, this Court has the benefit of considerable expert evidence on actual consumptive use and the benefit of evidence showing how the entire system has actually operated amicably and efficiently for well over 50 years. The Court does not consider the depletion approach practical or accurate in this case.

Exclusive of pressing the depletion approach, the United States has agreed with all other parties that this Court should recognize the historical customs, practices and agreements by which water has been distributed in the upper river areas. The United States stated many times, both in its briefs and through the testimony of its expert witnesses, that the government had no interest in the daily irrigation practices of the upstream users but rather desires a

reasonable quantification of the upstream rights so as to clarify the protection of its downstream rights. The United States presented no evidence as to water duties for the upstream area but urged in the post-trial briefs that the Special Master's recommendation of 5 acre-feet per acre delivered to the farm be adopted for three segments of the upper river and 4.7 acre-feet per acre should be allowed for the remaining segment. The Master's recommendation of 5 acre-feet per acre was a limitation to be imposed only when the river is on regulation; this is not a meaningful restraint in the Court's view.

The defendants presented extensive expert evidence on the water duties for the upstream area. The evidence showed that, as in the lower river area, the water duties must be varied to take into account soil character and slope. However, even where a relatively high water duty is assigned, other water users are not injured because the water not consumed all flows either back into the river or onto the water rights lands of another appropriator. In other words, some lands need large amounts of water just to achieve adequate irrigation coverage but the extra water is not wasted. Water duties not accounting for these variable factors would force the abandonment of many presently productive acres, especially in the Alpine County and Southern Carson Valley areas.

The lands on the upper Carson River must be classified into three broad categories according to soil character and slope:

(1) Benchland or river terrace—course textured, highly permeable, excessively drained and low water holding capacity soils; deep ground water depth (4 to 20 feet); moderately sloping topography; cobbles or boulders on the surface.

(2) Alluvial fan—medium textured, moderately permeable, moderately drained and moderate water holding capacity soils; moderate ground water depth (4 to 7 feet); gently sloping topography.

(3) Bottomland or meadowland—medium to fine textured, low permeability, poorly drained and medium water holding capacity soils; shallow ground water depth (0.3 to 3 feet); level topography.

One of the difficulties presented by the evidence is that the expert who testified for the Carson Valley defendants recommended duties in terms of canal diversion requirements, whereas the expert for the Alpine County defendants recommended duties in terms of water delivered to the farm. However, this is only superficial inconsistency since most of the users in Alpine County are very close to the river so that the farm delivery requirement and the canal diversion requirement are essentially the same. The most credible expert evidence showed, and the Court finds, that the water duties, stated in terms of the canal diversion requirement, are 4.5 acre-feet per acre for the bottomland, 6.0 acre-feet per acre for the alluvial fan, and 9.0 acre-feet per acre for the benchlands.

No map delineating the areas of these three land types has been introduced in evidence but one expert made a planimeter study of the Upper Carson and the amounts of the three different types of land in each segment of the river. The Court finds that:

Segment 1 is almost entirely riparian and is ignored for these purposes;

Segment 2 contains a 25,916 acre irrigated area with 2,595 acres of benchland, 10,366 acres of alluvial fan, and 12,958 acres of bottomland;

Segment 3 is almost entirely riparian and is ignored for these purposes;

Segments 4 and 5 contain a 12,058 acre irrigated area from the Fredericksburg ditch to the confluence of the two forks with 4,335 acres of benchlands and 5,568 acres of bottomland (comparable data is not available for the area above (south) of Fredericksburg ditch);

Segment 6 contains a 5,007 acre irrigated area with the areas on the right bank having the 6.0 acre foot duty because of the deep ground water table and the left bank areas having the 4.5 acre foot duty because of the higher ground water table;

Segment 7 contains a 6,450 acre irrigated area with 2,244 acres of benchland, 2,065 acres of alluvial fan and 2,142 acres of bottomland.

The evidence is inadequate specifically to identify the acreages falling within each of the three land types and the column in the Special Master's Report assigning an acre foot per acre duty to each claim will be eliminated from the final decree. The Water master will exercise discretion in distributing the water to meet the demands of the various land types hereinabove noted, insofar as it is practical to do so.

C. *Consumptive Use.*

The most credible expert evidence showed that the net consumptive use of surface water on the upper river irrigated lands is 2.5 acre-feet per acre. The upper river consumptive use is somewhat lower than the Lahontan region consumptive use because the upper river climate is cooler and the growing season shorter. One region slowly shades into the other in the area between the reservoir and Carson City but for practical reasons the decree treats Lahontan as the dividing line.

HISTORIC PRACTICES, CUSTOMS, AGREEMENTS AND DECREES FOLLOWED IN THE UPSTREAM AREAS.

The upstream users presented detailed testimony as to historic water distribution practices followed by the water users and by the Federal Water Master not only before but since the entry of the temporary restraining order in 1950. We have the advantage of almost thirty years of experience under that order. An example of these customs is the practice of rotating an entire head of water in a ditch among users during low flow periods rather than giving each user a small portion of the available supply.[2]

The position of the United States on the historic practices issue is succinctly stated at page 49 of the United States Post Trail Memorandum:

> "the United States has only one concern: that the upstream users do not deplete from the stream any more water than reasonably needed to satisfy the historical requirements for

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[2] For a detailed listing of the historic customs, practices, agreements and decrees see the Decree.

the irrigated acreage in accordance with the priorities determined in this case."

The United States appears to be mainly, if not solely, concerned with quantification of the rights and a consumptive use finding. The expert witnesses for the United States stated several times that the defendants could continue their historic practices as long as net depletion was not increased.[3]

The Court finds that the continuation of the historic practices would not increase net depletion. In fact, the evidence presented by the defendants showed that through years of practical experience and cooperation, the farmers have developed a reasonable and workable system of water distribution. The evidence showed that the historic practices are highly efficient, practical and enhance the maximum beneficial use of the water. This Court approves and adopts the customs, practices, agreements and decrees set forth in the Decree; the Water Master is directed to include these practices in his administration of the river.

THE IMPACT OF IRRIGATION OF WATER RIGHT LAND BY "RETURN FLOW" OR "TAIL WATER" FROM OTHER LANDS.

The evidence showed that large portions of the Alpine County and Carson Valley lands are irrigated by so-called return flows. This practice occurs because water is diverted into large ditches or canals and the water is run over the second appropriator's lands and so on until eventually the water returns to the river or to another diversion canal. The evidence specifically showed that all appropriators *could* irrigate their lands by direct diversions but that it is much more efficient to use a large canal and the return flow method. The vested water rights recognized by the Decree are rights to direct diversions from the stream system, which may be exploited by use of return flows from other lands.

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[3] In the Stipulated Pre-trial Order filed January 11, 1979, the United States specifically agreed that the administration of the river in autonomous segments was an historic practice and thus the United States has implied approval of this practice as well. Nowhere did the United States attack the segmentation practice.

This Decree therefore does not differentiate between water right land irrigated by direct diversions and water right land irrigated by return flows. The return flow method should be encouraged as it appears to be a more economical, practical method of water distribution than hundreds of small direct diversion ditches.

SEGMENTATION OF THE RIVER IN ENFORCING PRIORITY RIGHTS.

The evidence shows that the physical characteristics of the Carson River do not nicely conform to strictly traditional legal concepts of enforcing priorities. Under a pure or theoretical view, a senior priority appropriator on a river should never go without water when a junior priority appropriator has water. The Carson River system presents several obstacles to the application of this theoretical concept.

First, the upper reaches of the river are separated into two forks: the East Fork and the West Fork. These different branches of the river are, until close to their confluence, separated by a considerable distance and varied topography, including steep foothills. An example, then, of the difficulties presented is a situation where there is a senior appropriator on the West Fork and a junior appropriator on the East Fork and the senior user is low on water yet the junior user has a full supply. There is no physical way to deprive the junior user to satisfy the senior user.

A second example of the peculiarities of the river system is the late season appearance and disappearance of water from the river bed. The testimony indicated that in the late summer when the river is quite low, the river bed will be entirely dry for some stretches but that water reappears further downstream. The reappearance of water is the result of underground drainage from upstream irrigation or surface return flows from irrigation. This water is then available for use further downstream. This state of affairs makes it virtually impossible to "bring" water from an upstream junior appropriator down to a senior appropriator.

The Court is presented with a conflict between the pure theory of priority rights and the practical realities of the river system. In effect, this conflict is between the priority concept and the well-

established principle of western water law that water must be economically, practically and beneficially used, so far as is possible. In this Court's view, the waste of water must be avoided, for wasted water benefits no one. Thus, the pure priority concept, which would waste large amounts of water and other resources were it to be strictly applied, must be modified. For these reasons, the Court finds that the river must be divided into 8 segments.[4]

Each of these 8 segments shall be treated autonomously once the river is on regulation. For example, the Water Master shall distribute water in Segment 3 in accordance with the priorities in the limits of Segment 3. The Water Master shall not enforce a senior priority in one segment of the river against a junior priority in another segment of the river. The Court finds that this arrangement provides for by far the most economical and beneficial use of the available water and the most practical rule for administration by the Federal Water Master.

PROVISIONS REGARDING CHANGES IN THE PLACE OF DIVERSION, PLACE OF USE AND MANNER OF USE.

It appearing to the Court that the state law procedures for change applications are markedly different in California and Nevada, the Court adopts a different approach as to each state.

A. *Nevada*—Nevada's comprehensive scheme of water rights regulation is found in Chapters 532-544 of the Nevada Revised Statutes. N.R.S. 533.325 requires any appropriator who wishes to change the place of diversion, manner of use or place of use of water already appropriated to make an application to the State Engineer for a permit for such a change. N.R.S. 533.345-533.365 discuss application contents, notice procedures, protest procedures and other administrative details. N.R.S. 533.370 sets forth the State Engineer's duties in approving or rejecting applications. N.R.S. 533.370(4) states:

> "Where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights or threatens to prove detrimen-

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[4] See the Decree for a specific description of the segments and subsegments.

> tal to the public interest, the state engineer shall reject the application and refuse to issue the permit asked for."

The testimony presented by the State of Nevada at trial further indicated that the State Engineer considers it his duty to reject change applications which would adversely affect the rights of other appropriators.

Clearly under this statutory scheme the State Engineer has the authority and expertise to address change applications on an individual basis. This Court, of course, has the power to review decisions by the State Engineer. *See* N.R.S. 533.450. Since the State Engineer's decisions are governed by the correct legal principle that change applications are not permitted where other, and even junior, prioroty users would be adversely affected, *Clark on Waters and Water Rights*, Vol. 5, page 158; Trelease, *Changes and Transfers of Water Rights*, 13 Rocky M.M.L. Inst. 507 (1967), and in view of the existing comprehensive regulatory scheme, all Nevada change applications will be directed to the State Engineer and will be governed by Nevada law.

This Court has drawn a distinction in this opinion and decree between the water duty allowed for proper irrigation and the net consumptive use of the surface water. The State Engineer is directed that change of manner of use applications should only be permitted for the consumptive use amounts determined in this decree (2.99 acre-feet per acre for the areas below Lahontan Reservoir and 2.5 acre-feet per acre for the areas above Lahontan Reservoir) when use is changed from irrigation to any other purpose. Water that has been allowed in the duties for purposes of irrigation coverage could not then be changed to a consumptive use and disappear from the return flows to other water right lands or the river.

B. *California*—California law for change procedures does not provide adequate advance protection of all interests in all circumstances. Therefore all petitions for changes in place of diversion, manner of use or place of use must be submitted to this Court. As noted above, a change from irrigation use to any other use will only be permitted for the consumptive use amount. Riparian

rights as recognized by California law shall be fully enforced and protected.

A special hearing was held on October 15, 1980 concerning claims of the United States to reserved rights for water on the Toiyabe National Forest. At the conclusion of the hearing three classes of rights were recognized and have been included in the tabulations in the final Decree. In addition, the United States asserted a reserved claim to certain instream flow rights in the streams and tributaries above the Nevada-California state line. The claim asserted is that the rate of flow in the stream system should not be permitted to fall below the mesne monthly rate of flow at nine gauging stations based on data compiled by the United States Geological Survey. The compilation of such data was received in evidence as Exhibit E. The evidence to support the assertion that maintenance of such minimum flows is necessary for watershed protection and timber production (the purposes of national forest reservations) was insignificant. We interpret *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978) as not recognizing a reserved right to instream flows in these circumstances.

Nevertheless, it will be appropriate in the future for the Nevada State Engineer and this Court to take into consideration the effect of any proposed change of place or manner of use or point of diversion upon the average mesne monthly flows at the several gauging stations as established by the evidence referred to.

Appendix B

In the United States District Court
for the District of Nevada

Civil No. D-183 BRT

The United States of America,
Plaintiff,

vs.

Alpine Land & Reservoir Company, a corporation, et al.,
Defendants.

Final Decree

Findings of Fact, Conclusions of Law,
Tabulation and Administration Provisions

FINDINGS OF FACT

I. This Court has jurisdiction over the subject matter and the parties to this proceeding.

II. The Carson River and its tributaries are interstate streams and the waters of the Carson River and its tributaries are fully appropriated.

III. Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the Interior, on July 2, 1902, withdrew from public entry, excepting under the homestead laws in accordance with the provisions of the Act, the lands required for the government's first reclamation project, now known as the Newlands Project.

IV. The United States has diligently proceeded with the construction of the Newlands Project and has expended over Six Million Dollars ($6,000,000) in that construction. The works so constructed have been used for many years for the storage of Carson River water and the distribution thereof to Project lands. The principal structure of the Project is the Lahontan Reservoir which was completed at a cost of approximately One Million Four Hundred Thousand Dollars ($1,400,000). Lahontan Reservoir has a capacity of 295,149 acre-feet to the spillway crest. With 20 inch flashboards on the crest, the capacity is 317,280 acre-feet.

The lands of the Newlands Project irrigated or susceptible of irrigation by the waters of the Carson River and its tributaries include 80,000 acres of cultivable lands, 50,000 acres of pasture lands, and 7,500 acres of land in the Truckee Division of the Project.

* * *

VIII. The lands on which the waters of the Carson River and its tributaries are used lie in an arid region of the United States; to make these lands productive, irrigation thereof is necessary; these lands vary widely in texture, porosity, terrain, inclination, vegetation, crop use, sub-surface stratas and other factors which effect the amount of water necessary to irrigate different portions of said lands and further affect the amount of water which is returned to the main course by drainage and other means; the various areas require, for proper irrigation and crop productivity varying quantities of water per acre. In the Newlands Project, the water duties are 3.5 acre-feet per acre delivered to the land for the bottomland and 4.5 acre-feet per acre delivered to the land for the bench land. In the lands above the Newlands Project the water duties are 4.5 acre-feet per acre diverted to the canal for the bottomlands, 6.0 acre-feet per acre diverted to the canal for the alluvial fan lands and 9.0 acre-feet per acre diverted to the canal for the bench lands. The water duties assigned for the various categories of the land are the total duties from whatever source of surface water.

The net consumptive use of surface water for irrigation on the Newlands Project is 2.99 acre-feet per acre. The net consumptive use of surface water for irrigation of the lands above the Lahontan Reservoir is 2.5 acre-feet per acre.

* * *

ADMINISTRATIVE PROVISIONS

I. Without the application of water, the lands described above are dry and arid and irrigation is necessary for the production of valuable crops thereon. The respective amounts of water stated above to have been appropriated for or used on these lands, are, in each instance, the maximum amount necessary and sufficient for the reasonable and economical irrigation of crops thereon.

II. The above-named parties who have appropriated water for irrigation have also used and are entitled and allowed to use water for livestock and domestic purposes, but only in such amounts as may be necessary for watering stock and for domestic purposes. The priority in respect to the use of water for livestock and domestic purposes shall be identical to the priority of that party's irrigation right.

III. The parties, intervenors, grantees, successors in interest and substituted parties, assigns and each of their servants or agents and all persons claiming by, through or under them in or to the water rights or lands above described are, and each of them is hereby, until otherwise ordered, restrained from asserting or claiming, except in this action, any right in or to the waters of the Carson River or its tributaries, or the waters of any of the creeks or streams or other waters mentioned above except in accordance with the rights specified, determined and allowed by this Decree.

* * *

VI. A Water Master shall be appointed by this Court to carry out and enforce the provisions of this Decree and the instructions and orders of this Court. If any proper order, rule or direction of the Water Master, made in accordance with and for the enforcement of this Decree, is disobeyed or disregarded, he is empowered and authorized to cut off the water from the ditch or canal owners who disobey or disregard the order, rule or direction. If such a cutoff should occur the Water Master shall promptly report to the Court his actions and the circumstances surrounding the case.

When the Court deems it necessary, the Court shall authorize the employment by the Water Master of assistants so as to properly carry out the provisions of this Decree and the orders of the Court. The term of employment, expenses and compensation of the Water Master and his assistants, the payments and means and method of securing funds to pay the same, shall be fixed by orders of the Court from time to time. Any person feeling aggrieved by any action or order of the Water Master may, in writing and under oath, complain to the Court, after service of a copy of the complaint on the Water Master. The Court shall

promptly review the action or order and make such order as the circumstances warrant.

All disputes on the Carson River system involving the existence or ownership of water rights, the distribution of water or the transportation or measurement of water shall first be submitted to the Water Master for determination as a jurisdictional prerequisite to any complaint to the Court for relief.

The Water Master shall establish a file system for the water rights on the Carson system. The files will be numbered to correspond to the claim numbers set forth in this Decree and subdivided as may become necessary according to future ownership changes. The Water Master must be notified by the parties when title to a water right is changed and proof of the change of title must be provided to the Water Master. The Water Master shall not be required to deliver water to any new owner unless this provision is complied with. The file system shall be extended to include the Newlands Project farmlands only when the lands are sold or transferred or the water rights are sold or transferred. In each such instance the Water Master shall not be required to deliver water to the new owner until the Water Master's office has been informed of the transfer and proof of title going back to the original United States patent has been supplied.

The party in interest shall provide the Water Master with a copy of either the approved application by the State Engineer or this Court's order where requests for changes in the place of diversion, place of use or manner of use are approved. The Water Master is not required to recognize such changes unless and until provided with the order or approved application.

* * *

XIII. The Court hereby expressly reserves jurisdiction to modify, amend, eliminate, add to or change any provision of this Decree.

DONE IN OPEN COURT this 28th day of October 1980.

BRUCE R. THOMPSON
United States District Judge

Appendix C

United States of America,
Appellant,

v.

Alpine Land & Reservoir Co.; Truckee-Carson Irrigation District; Sierra-Pacific Power Co.; State of Nevada; and Certain Upper Carson River Water Users,
Appellees.

No. 81-4084.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 14, 1982.

Decided Jan. 24, 1983.

Appeal from the United States District Court for the District of Nevada.

Before KENNEDY, ALARCON AND NELSON, Circuit Judges.

KENNEDY, Circuit Judge:

The Carson River runs eastward from the Sierra Nevada range in California, through a part of Toiyabe National Forest, and then to Lahontan Reservoir in central Nevada, where it joins with water from the Truckee River Diversion Canal. *See United States v. Alpine Land & Reservoir Co.*, 431 F.2d 763, 765-66 (9th Cir.1970), *cert. denied*, 401 U.S. 909, 91 S.Ct. 869, 27 L.Ed.2d 807 (1971). Downstream from Lahontan Reservoir lies the Carson Division of the Newlands Project, whose farmers are mostly members of the Truckee-Carson Irrigation District (TCID), one of the appellees here. The Newlands Project on Nevada's Carson River was one of the first constructed under the Reclamation Act of 1902, 32 Stat. 390, *codified at* 43 U.S.C. § 371 *et seq.*

This suit was begun by the United States as a quiet title action in 1925, although no final decision was rendered until the decision of the district court in 1980, reported at 503 F.Supp. 877 (D.Nev.1980). This litigation is a "virtually comprehensive adjudication," *United States v. Truckee-Carson Irrigation District*, 649

F.2d 1286, 1308 (9th Cir.1981), of the rights of all parties to the Carson's waters, and much of the district court's opinion and extensive final order is not contested by any party. On this appeal, the United States does argue that the water duty awarded farms in the Newlands Project was too generous; that the Secretary of the Interior, rather than the Nevada State Engineer, should have primary jurisdiction over change applications; that the district court erred in rejecting the United States' claim of a reserved right of instream flow for Toiyabe National Forest; and that no water duty for fishing and recreation at Lahontan reservation should have been awarded. *Amici* Paiute Tribe, Environmental Defense Fund, and Sierra Club agree with the United States in whole or in part. Supporting the decision are TCID, the State of Nevada, and Sierra Pacific Power Company.[1] We uphold the decision of the district court, for the most part, although we vacate the judgment with reference to the water duty awarded for public recreation pending more specific findings. We discuss the issues seriatim.

I. *Water Duty for Newlands Project Farmers*

The district judge awarded a water duty of 3.5 acre-feet/year (afa) to bottomland farmers, and 4.5 afa to benchland farmers in the Newlands Project. The United States and supporting parties argue that the district court erred in making a *de novo* determination of beneficial use. The Government argues that the district court instead should have ruled in reliance on contracts executed by the Department of the Interior and some landowners which purport to limit the water duty to a maximum of 3 afa, or alternatively on a 1903 Nevada statute, passed after the priority date of the Newlands Project, which limited beneficial use to 3 afa until it was repealed in 1905. The United States also argues that the findings of the district court on beneficial use were inadequate. We reject these contentions.

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[1] Certain upstream farmers have participated as appellees in this suit, but their only interest is in defending the water duty awarded them, which the United States does not challenge.

Our starting point is section 8 of the Reclamation Act of 1902, 32 Stat. 390, now codified at 43 U.S.C. § 372 (1976), which states:

> The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

By the terms of the statute, beneficial use is the "basis" and "measure" as well as the "limit" of water rights; it sets the maximum water duty, but, under the statute, it is also the necessary rationale and source of the right. This determination by Congress is explained both by the historical significance of the beneficial use concept in western water law, and by the absence of any other intelligible standard offered by these parties to measure water rights.

The legislative history of the 1902 Reclamation Act makes clear that the "principles underlying and governing water rights" under the Act were to be the existing beneficial use concepts of western water law. 35 Cong.Rec. 6677 (1902) (remarks of Rep. Mondell). Section 8 "clearly recognizes the rule of prior appropriation which prevails in the arid region, and, what is highly important, specifies the character of the water right which is provided for under the provisions of the act." *Id.* at 6678. Rep. Mondell went on to describe the manner in which a water duty would vest:

> The main line canals having been constructed by the Government, the entryman or landowner would proceed to the construction of such laterals as were necessary for the irrigation of his own tract and the preparation of the same to receive the water. The water having been beneficially applied and payments having been made under the provisions of the bill, the water right would become appurtenant to the land irrigated and inalienable therefrom. The water rights provided by the act are of that character which irrigation experience has demonstrated to be the most perfect.
>
> The settlor or landowner who complies with all the conditions of the act secures a perpetual right to the use of a

> sufficient amount of water to irrigate his land, but this right lapses if he fails to put the water to beneficial use . . .

Id. at 6679. While there were provisions of federal law which were intended to displace state law, such as the 160-acre limit at issue in *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (1982), beneficial use itself was intended to be governed by state law. *See* Remarks of Rep. Mondell, *supra*; 35 Cong. Rec.2222 (1907) (remarks of Sen. Clark); *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978). We do not deny or overlook the differences in water law among the various western states. However, on the point of what is beneficial use the law is "general and without significant dissent." 1 *Waters and Water Rights* § 19.2 at 85 (R. Clark ed. 1967). Therefore, unless it is shown that a state applies a special rule of law on a relevant point, it is proper to apply general law in defining beneficial use.

We briefly review these general principles here. The major conceptual tool for implementing beneficial use is the water duty, which is the amount of water an appropriator is entitled to use, including a margin for conveyance loss. This definition of "water duty" is often quoted:

> It is that measure of water, which, by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of such crops as ordinarily are grown thereon. It is not a hard and fast unit of measurement, but is variable according to conditions.

Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 584-85, 272 P.2d 629, 634 (1954); *see also Basin Electric Power Cooperative v. State Board of Control*, 578 P.2d 557, 564 (Wyo.1978); *State ex rel. Reynolds v. Mears*, 86 N.M. 510, 515-16, 525 P.2d 870, 875-76 (1974); 1 *Waters and Water Rights* §§ 19.2-19.5 at 85-93 (1972); 5 *id.* § 408.2 at 79-80 (R. Clark ed. 1967).

There are two qualifications to what might be termed the general rule that water is beneficially used (in an accepted type of use such as irrigation) when it is usefully employed by the

appropriator. First, the use cannot include any element of "waste" which, among other things, precludes unreasonable transmission loss and use of cost-ineffective methods. *See, e.g., State ex rel. Erickson v. McLean*, 62 N.M. 264, 271, 308 P.2d 983, 987 (1957); *Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 588, 494 P.2d 1029, 1031-32 (1972); 1 *Waters and Water Rights* §§ 19.2, 19.5 at 87, 91-92 (R. Clark ed. 1967). Second, and often overlapping, the use cannot be "unreasonable" considering alternative uses of the water. In *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 F. 9, 22-25 (9th Cir.1917), although application of additional water over the water duty awarded by the district court would provide some benefit to the appropriator, we upheld the district court's water duty because the gain was so small (compared to the amount of water necessary to bring it forth) that the additional increment of water would not be "economically applied." *Id.* at 24. *See also In re Water Rights of Deschutes River & Its Tributaries*, 134 Or. 623, 664-68, 286 P. 563, 577-78 (1930) (use of water to carry off debris in aid of power generation not allowed in irrigation season when the same water would otherwise irrigate 1600 acres); *Tulare Irrigation Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal.2d 489, 567-68, 45 P.2d 972, 1007 (1935) (use of water by farmers to drown gophers not allowed in area with chronic water shortage). *See generally* Trelease, *The Concept of Reasonable Beneficial use in the Law of Surface Streams*, 12 Wyo.L.J. 1, 14-17 (1956).

The United States and supporting *amici* argue that the district court should have given decisive significance to contracts limiting the water duty to 3 afa which the Secretary of the Interior executed with some but not all landowners. We are also told all of the Newlands Project is limited to a 3 afa water duty by virtue of 1903 Nevada Stats., Chap. IV, § 2:

> the quantity of water which may be appropriated or used for irrigation purposes in the State of Nevada [is limited to] three acre feet per year for each acre of land supplied.

The district court was not bound by either the contracts or the 1903 Nevada statute if either pointed to a different water duty than a beneficial use inquiry would indicate. As for the contracts, the provision of section 8 mandating a beneficial use standard is a

"specific congressional directive" which acts as a "restraint upon the Secretary." *See California v. United States*, 438 U.S. 645, 678 n. 31, 98 S.Ct. 2985, 3002 n. 31, 57 L.Ed.2d 1018 (1978); *Fox v. Ickes*, 137 F.2d 30 (D.C.Cir.), *cert. denied*, 320 U.s. 792, 64 S.Ct. 204, 88 L.Ed. 477 (1943); *Lawrence v. Southard*, 192 Wash. 287, 73 P.2d 722 (1937).

The district judge found that under the Nevada "relation back" doctrine, the 1903 statute did not affect the Project farmers' rights which had vested in 1902. We do not find this decision of the district court on the law of its own state incorrect. Even assuming the Nevada statute provided a measure other than beneficial use, the limit would be ineffective in view of the binding "congressionsl directive" that "the water right must be . . . governed by beneficial use." *California v. United States*, 438 U.S. 645, 668 n. 21, 98 S.Ct. 2985, 2997 n. 21, 57 L.Ed.2d 1018 (1978).

The United States and *amici* argue that, even if beneficial use is the measure, the contracts and Nevada law are compelling evidence of beneficial use. Although we reject the conclusion the United States wants, we do not hold that the Secretary's contracts were *ultra vires* when made, or that the Nevada statute (assumed for the moment to be applicable) stated a limitation inconsistent with beneficial use as of 1903. This is not the question before us. The issue we review is whether the district court reached a correct determination of beneficial use as of 1980. It is settled that beneficial use expressed a dynamic concept, which is a "variable according to conditions," *Farmers Highline Canal*, 129 Colo. at 585, 272 P.2d at 534, and therefore over time, *see United States v. Fallbrook Public Utility District*, 347 F.2d 48, 58 (9th Cir.1965); *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 3 Cal.2d 489, 567, 45 P.2d 972, 1007 (1935); *Basin Electric Power Cooperative v. State Board of Control*, 578 P.2d 557, 563 (Wyo. 1978). As counsel for the United States argued before the district court, "we are fortunate that this case has dragged along so long, because we know more about the Carson Valley than we did originally." 1979 Record, Vol. I at 16. All parties presented evidence aimed at identification of current beneficial use, as a matter of fact. The district court, in the absence of any earlier administrative or judicial determination of beneficial use, was

correct to find beneficial use as of the present time, as shown by the best available current information.[2]

In the circumstances, it is clear the district court did not err in giving the contracts and the Nevada statute relied on by the United States little evidentiary significance. The United States has made no consistent determination that 3 afa is the maximum water duty that could be beneficially used by the Project farmers. Indeed, it appears that one landowner would sign a contract containing a 3 afa limit, while others, identically situated, signed contracts promising all the water needed for "proper irrigation." An administrative determination which is not consistently maintained is entitled to little, if any, deference. *See County of Washington, Oregon v. Gunter,* 452 U.S 161, 177-78, 101 S.Ct. 2242, 2252-2253, 68 L.Ed.2d 751 (1981); *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 858 n. 25, 95 S.Ct. 2051, 2063 n. 25, 44 L.Ed.2d 621 (1975). We further note the evidence showed that the 3 afa contracts were never enforced; historically, no distinction was made between landowners with and without the limiting contracts. The district judge did not err in giving litle weight to the scattered contracts with 3 afa limits in the context of a case in which ample expert evidence of actual present beneficial use was heard.

For similar reasons, the district court did not err in ignoring the 3 afa limit of the 1903 Nevada statute. The Nevada statute has been repealed for many years. Testimony before the district court indicated that water duties of more than 3 afa are common in Nevada. We agree that the statute's repeal "represents a legislative judgment that a specific limitation was ill-advised under the

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[2] *Amicus* Paiute Tribe suggests that this holding will cause uncertainty and instability in water law. We find the law to be clear on this point; in the absence of a conclusive determination of water duty by administrative or judicial proceedings, a district court in a quiet title action should determine beneficial use of the best current evidence available. The holding of the district court in this case, which we affirm, does not interfere with settled expectations, since the water duty awarded is in accord with actual historical use of the Carson's waters by the Project farmers. It is actual use which, if reasonable, is evidentiary of "beneficial use," not unenforced contracts or limits set by a repealed state law.

varying conditions of climate and soil in Nevada." 533 F.Supp. at 886.

The United States also contends that the findings of the district court on beneficial use were not adequate. It is true that findings must be "explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision." *South-Western Publishing Co. v. Simons,* 651 F.2d 653, 655 (9th Cir.1981), *cert denied,* 455 U.S. 1018, 102 S.Ct. 1714, 72 L.Ed.2d 136 (1982), quoting *Alpha Distributing Co. of California v. Jack Daniel Distillery,* 454 F.2d 442, 453 (9th Cir.1972), *cert denied,* 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed.2d 70 (1973). The opinion of the district judge fulfilled this requirement. In light of the record, we can readily understand the grounds of the district court's opinion; all issues raised were intelligibly dealt with by the district court.

The United States does not squarely argue that the district court made any legal errors in finding beneficial use.[3] One of the Government's arguments, however, might be interpreted as arguing that the district court erred in defining beneficial use as the amount of water which would yield "maximum crop yields," rather than that amount which, "economically applied," would produce "historical yield" over most of the past 26 years. This contention fails because the case, as argued to the district court, presented a factual dispute rather than a legal one. The beneficial use controversy here was essentially a question of fact, and all parties proceeded in accordance with well-settled general principles to determine it. There was uncontradicted testimony that the water duty awarded by the district court has been customarily

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[3] The United States argues that the district court's decision was corrupted by an erroneous belief that the water rights in question were "owned" by the Newlands Project farmers, subject only to the "lienholder" interest of the United States in repayment of project costs. We do not see the relevance of this premise to the issue of beneficial use. The United States' interest in the determination of a user's water duty, as declared by the statute, is to see that beneficial use is its measure and limit. Any interest of the United States in other aspects of the project can hardly affect the beneficial use inquiry.

provided the farmers since before 1926, when TCID began operation of the Newlands Project. This has also been the water guaranteed the Newlands Project farmers under the Orr Ditch decree. The Orr Ditch decree governs the Truckee's waters, which, by means of the Truckee River Division Canal, join with the Carson's waters at Lahontan Reservoir. *See generally United States v. Truckee-Carson Irrigation District,* 649 F.2d 1286 (9th Cir.1981). TCID's evidence tended to show this historical water usage was reasonable. The United States' evidence tended to show that historical yields could be obtained with less water. Once the district court corrected for the fact that the United States' expert used alfalfa yields obtained in lysimeters rather than those obtained under necessarily less meticulous field conditions, and for the fact the United States' expert used yields over the past 26 years rather than the significantly higher production of the past 10 years as a benchmark, the evidence presented by the United States was in broad agreement with that presented by TCID.[4] *See* 503 F.Supp. at 888.

Neither the United States nor the Paiute Tribe argues that the district court's findings were clearly erroneous. *Amicus* Paiute Tribe does suggest that we should find waste by virtue of the comment of this court in *United States v. TCID,* 649 F.2d at 1311, that "the Newlands Project is relatively inefficient in its use of water." This comment was not based on any factfinding by our court or by the court below, and it cannot substitute for evidence of the existence and extent of waste or inefficiency before the trial court. There was credible evidence below to indicate the contrary: that a reduction to the 3 afa water duty sought after by the United

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[4] Thus, contrary to the argument of the United States, the district court did not rest on the conclusory statement that TCID's expert evidence was "more credible" than that so vigorously put forward by the United States. Indeed, in determining consumptive use (the actual amount used by the growing crop, leaving aside transmission losses), the district court used the figure argued for by the United States' expert, with the two corrections noted. No one has argued that the 2.99 afa consumptive use figure found by the district court on the basis of the United States' evidence was inconsistent with the water duties awarded by the district court.

States would drastically reduce the farmers' yields over the long term. Yield was correlated with water use in a linear relation over the relevant water levels. Agricultural yields are a significant and reliable guide in determining beneficial use.

Findings of a district judge, made in reliance on controverted expert testimony, will not be disturbed unless clearly erroneous. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 365 F.Supp. 235 (N.D.Cal.1972). The Supreme Court has only recently emphasized our narrow scope of review when we review a factual determination of a district court that does not evince any misapprehension of relevant legal standards. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ___ U.S. ___, 102 S.Ct. 2182, 2188, 72 L.Ed.2d 606 (1982). Our review of the record indicates there was ample evidentiary support for the decision of the trial court that 3.5 afa was an appropriate water duty for bottomlands, and 4.5 afa for benchlands, with their lower water table and drier soil. Since the district court made no legal error in defining beneficial use, and its factual findings were well within a permissible view of the weight of the evidence, the water duty awarded the Project farmers must be upheld.

II. *Primary Administrative Jurisdiction With the Nevada State Engineer*

The district judge held that applications for change in place of diversion or manner or place of use should be directed to the Nevada State Engineer. These change applications are of limited significance in that they only seek permission for a purpose different than that originally designated. For example, if a farmer were to change his manner of irrigation, or to subdivide his farm into residential properties, under the district court's order, the Nevada State Engineer would decide, under the state statutory scheme, whether the application would "tend to impair the value of existing rights or to be otherwise detrimental to the public welfare." Nev.Rev.Stat. § 533.370(1).

The United States is not concerned with the routine change application, but with the possibility that federal interests will be ignored by the Nevada State Engineer. Under section 8 of the

1902 Reclamation Act, discussed *supra*, appropriated water must be applied to irrigation; it cannot be severed as a commodity for use on land to which it would not be appurtenant. As described by Rep. Mondell, a water right under the Reclamation Act "only extends to the use of the water on and for the tract originally irrigated"; there is no general "property right in water with power to sell and dispose of the same elsewhere and for other purposes than originally intended." 35 Cong.Rec. 6679 (1902).

We agree with the district judge that the notice and protest procedures of Nevada law are adequate to allow exploration of these issues, when they arise, before the state engineer. The Supreme Court has held, in *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978), that state law will control the distribution of water rights to the extent that there is no preempting federal directive. We agree with the district judge that "the conspicuous absence of transfer procedures, taken in conjunction with the clear general deference to state water law, impels the conclusion that Congress intended transfers to be subject to state water law." 503 F.Supp. at 884. Powerful support for this conclusion is found in the legislative history of the 1902 Reclamation Act:

> The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another. The conditions that prevail at 7,000 feet of altitude are different from those that prevail at almost sea level. In each and every one of the States and Territories affected, after a long series of experiments, after a due consideration of conditions, there has arisen a set of men who are especially qualified to deal with local conditions.
>
> Everyone of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution to the problem of irrigation in their individual localities.

35 Cong.Rec. 2222 (1902) (remarks of Sen. Clark). *Cf. Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819-20, 96 S.Ct. 1236, 1246-1247, 47 L.Ed.2d 483 (1976)

(discussing a similar, but later, congressional recognition in the McCarran amendment). We are assured that the United States will receive notice of each change application, and may participate, under Nev. Rev.Stat. §§ 533.110-533.130, in proceedings before the state engineer who is, under our Constitution, bound to follow federal law. The decree of the district court also allows for appeal of change applications to the federal district court for the District of Nevada, and no appellee contests this provision. These two safeguards provide full vindication of the admitted federal interests in the operation of federal reclamation projects.

Fundamental principles of federalism require the national government to consult state processes and weigh state substantive law in shaping and defining a federal water policy. *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978).

III. *Toiyabe National Forest*

The district court rejected the United States' argument that it was entitled to a water duty of instream flow, reserved by implication when the affected portion of the Toiyabe National Forest was created by statute. *See Winters v. United States*, 207 U.S. 564, 577, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908); *Arizona v. California*, 373 U.S. 546, 597-98, 83 S.Ct. 1468, 1496-1497, 10 L.Ed.2d 542 (1963); *Cappaert v. United States*, 426 U.S. 128, 143-46, 96 S.Ct. 2062, 2071-2073, 48 L.Ed.2d 523 (1976); *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978).

As we understand it, the district court ruled, 503 F.Supp. at 893, that the United States would have been entitled to a reserved right if it had shown that the right was "necessary to preserve the timber or to secure favorable water flows for private and public uses under state law." *United States v. New Mexico*, 438 U.S. at 718, 98 S.Ct. at 3023; *see also id.* at 724-25, 98 S.Ct. at 3026 (Powell, J., dissenting in part).

The district court held, however, that the United States did not meet this standard. "The evidence to support the assertion that maintenance of such minimum flows is necessary for watershed

protection or timber production . . . was insignificant." 503 F.Supp. at 893.

We first find it necessary to discuss the nature of a reserved instream flow right. It appeared from the evidence presented below that since the sought-after right is one of instream flow only and not of diversion, awarding it would not harm downstream interests. The only result of recognizing a reserved right of instream flow will be to restrict upstream diversion by appropriators with a later priority date than the date of dedication of the national forest. It is possible that such upstream diversion might one day threaten, but the United States did not demonstrate that the water rights of existing downstream interests in the Carson's water would not suffice to protect the banks of the Carson's tributaries within the forest from erosion. In fact, in a colloquy with Judge Thompson below, counsel for the United States agreed that "the possibility that someone else will come in and take water for the detriment of those existing [instream] flows" was avoided "by making a finding that all the waters of the Carson River and its tributaries have been fully appropriated." Moreover, the United States' evidence of what average instream flows were fell far short of a demonstration that the instream flow was necessary to fulfillment of the purposes of the forest. *Cf. Avondale Irr. Dist. v. North Idaho Properties, Inc.*, 99 Idaho 30, 39, 577 P.2d 9, 18 (1978); *Boles & Elliott, United States v. New Mexico and the Course of Federal Reserved Water Rights*, 51 Colo.L.Rev. 209, 229 (1978). The district judge did not err in rejecting the United States' claim for a reserved water right with respect to the parties in this litigation.

IV. *A Water Duty for Recreation at Lahontan Reservation*

The district court in its opinion took judicial notice of the fact that fishing and public recreation have taken place on Lahontan Reservoir virtually since the construction of the dam. Thus, the water has been beneficially used and the United States has not abandoned or forfeited these rights. 503 F.Supp. at 883. The district court thus awarded a water duty of 30,000 acre-feet for such activities, finding that the evidence indicated this was the "minimum amount of water that must be retained in the reservoir

to support the fish habitat and provide swimming and boating areas." *Id.* at 889. It is not clear to us what evidence the court relied upon in this respect. Certainly no party presented evidence to establish a specific, public recreational right. The United States did not seek this water duty, and on appeal argues that it is erroneous, as do *amici* and TCID.

We are unwilling to accept as determinative the agreement of the parties that no such water duty is proper. Those taking advantage of these recreational opportunities were not parties, or at most, were represented most grudgingly and inadequately by the United States.

While the district court found that "the public" could gain rights to a reclamation project reservoir by continuous beneficial use under state law, 503 F.Supp. at 883, whether water rights for public recreation are permissible under the Reclamation Act has not been briefed or discussed. We are also unsure of the necessity for the nonconsumptive water duty awarded by the district court. Fishing and recreation have been consistently enjoyed, notwithstanding the absence of any formally awarded water duty; since the waters of the Carson are fully appropriated, we do not foresee how the public's recreational benefits can be threatened by any new use. In this respect, the water duty awarded the public for instream use resembles the guarantee of instream flow the United States unsuccessfully sought for Toiyabe National Forest. Assuming for the moment that such a water duty is proper in principle, we are not sure the district court had an adequate factual basis for awarding the precise water duty chosen. We therefore vacate the portions of the district court's order pertaining to a water duty for public recreation.

The district court maintains jurisdiction over this matter. *See Hamilton v. Nakai*, 453 F.2d 152, 155-58 (9th Cir.), *cert. denied*, 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed.2d 332 (1972). "A district court's equitable discretion is characterized by flexibility, the need for practicality, and the duty to reconcile the public interest with private needs." *Harjo v. Andrus*, 581 F.2d 949, 952 (D.C.Cir 1978). We therefore leave it to the determination of the district court to state an orderly resolution of the legal propriety (and if necessary, the factual extent) of a water duty for public recrea-

tion. The district court need not allow the issue to lie unresolved; if the United States is unwilling to represent the public, anyone with standing who can adequately represent the public's interest may be allowed to do so. *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975).

We do hold that, contrary to the final decree of the district court, any water duty for public recreation that is awarded must be subordinate to the agricultural needs of the Newlands Project farmers. The Lahontan Reservoir, as a project built under the federal Reclamation Act, was intended for the primary benefit of the farmers who would use its waters for irrigation, and any beneficial use of the reservoir by way of recreation could only be incidental to that purpose. *See Jicarilla Apache Tribe v. United States,* 657 F.2d 1126, 1138 (10th Cir.1981).

CONCLUSION

The district court awarded a proper water duty to the Newlands Project farmers, properly refused to award a reserved water right of instream flow for Toiyabe National Forest, and properly recognized the primary administrative jurisdiction of the Nevada State Engineer over change applications. We vacate the water duty awarded the United States, for the benefit of fishing and recreation, pending further proceedings on the important legal and factual issues implicit in the matter.

AFFIRMED AS MODIFIED.

Appendix D

In The United States District Court
For The District Of Nevada

No. CV-R-85-197-BRT

Order

Pyramid Lake Paiute Tribe of Indians,
Plaintiffs,

vs.

Donald Paul Hodel, Secretary of the Interior,
Defendant.

ORDER

It appearing that the Justice Department has recently filed on behalf of the Secretary of the Interior a Motion For Approval of Interim Operating Criteria and Procedures For the Newlands Reclamation Project and that certain orders are necessary to maintain the status quo as shown by Truckee-Carson Irrigation District's Ex Parte Motion For Protective Order; and good cause appearing,

IT IS HEREBY ORDERED:

1. Pending this court's ruling on the above-referenced motion of the Justice Department filed on behalf of the Secretary of the Interior, diversions of Truckee River water to Lahontan Reservoir as authorized by the Watermaster pursuant to the January 15, 1985, Order of Judge Walter E. Craig entered in the case of *Unted States v. Orr Water Ditch Co.*, Equity No. A-3, shall be permitted.

2. Truckee-Carson Irrigation District shall be permitted to deliver irrigation water during the period of November 1, through November 15, of this year to project farmers who have planted winter grain and/or new fall seedings of alfalfa on their project water right lands.

3. Disputes as to whether project lands are to be considered bench lands or bottom lands are to be initially submitted to and decided by the Watermaster pursuant to the provisions of the final decrees entered in the cases of *United States v. Orr Water Ditch*

Co., Equity No. A-3, and *United States v. Alpine Land & Reservoir Co.*, Civ. No. D-183. Pending the resolvement of those disputes by the Watermaster and, if review of his decision is requested, by the court in those poroceedings, the status quo shall be maintained and Truckee-Carson Irrigation District shall deliver the historical deliveries to those lands as shown on its bench and bottom land maps.

DATED: October 28, 1985

BRUCE R. THOMPSON
Judge

Appendix E

United States District Court
District of Nevada
Reno, Nevada

Civil-R-85-197-BRT
Minutes of the Court
Date: April 25, 1986

Pyramid Lake Paiute Tribe of Indians,
Plaintiff,
vs.
William P. Clark, et al.,
Defendants.

[Filed May 6, 1986]

PRESENT: Bruce R. Thompson, U.S. District Judge
Deputy Clerk: Cliff Chamblee Reporter: Cathy Worken
Counsel for Plaintiff(s) Robert Pelcyger
Counsel for Defendant(s) Fred Disheroon for Secretary of Interior; Frederick Girard for T.C.I.D.

Court Convenes at 1:30 P.M. & Concludes at 2:53 P.M. Hearing Motion of T.C.I.D. To Vacate Provision of Interim O.C.A.P. & Set Date for Hearing Objections to Interim O.C.A.P.:

IT IS ORDERED that the brief of plaintiff, filed April 24, 1986 is stricken. For the purpose of resolving disputes in regards to the question of Bench and Bottom Lands of The Newlands Project, IT IS ORDERED that T.C.I.D. may represent the position of landowners concerning proper methodology to be used, and that T.C.I.D. will have 30 days to file a petition on these issues; that Pyramid Lake Paiute Tribe of Indians and The Secretary of The Interior shall have 30 days thereafter to respond.

At the time that the petition of T.C.I.D. is filed, the Clerk of Court shall institute a separate action known as D-185-BRT, relating to the issues of Bench and Bottom Lands of The Newlands Project, and that an estimated 2 day Court Trial in civil action D-185-BRT is set for July 1, 1986, at 9:30 A.M.

IT IS ORDERED that after the petition of T.C.I.D. is filed and served, T.C.I.D. shall cause notice to be published in the Lahontan Valley News, stating that anyone affected by the classification of lands as Bench and Bottom Lands will be represented by T.C.I.D., and referring them to the file in the District Court Clerk's Office for specific information with respect to what is involved. Anyone who has an objection shall file an objection within 10 days after notice.

IT IS ORDERED that any water that has been released or distributed by May 15, 1986 in accordance with T.C.I.C. classification of Bench and Bottom Lands up to and including May 15, 1986, will not count prejudiciously against the farmers or ranchers allocation of water on an annual basis, and after May 15, 1986, the classification shown by the map prepared by the Bureau of Reclamation will be in effect.

CLIFF CHAMBLEE
Deputy Clerk

Appendix F

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Attorneys for TCID

United States District Court

District of Nevada

Civil No. D-185-BRT

United States of America,
Plaintiff,

vs.

Alpine Land & Reservoir Co., et al.,
Defendants.

TCID's Petition for Declaratory Relief
(Bench and Bottom Land Issue)

I

This court has jurisdiction over this matter under 28 USC §§ 1331 and 1361 and 5 USC § 702 and the continuing jurisdiction provisions of the final decrees in *United States of America, Alpine Land & Reservoir Co.*, Civil No. D-183-BRT (hereinafter "*Alpine*") and *United States of America v. Orr Ditch Company*, No. A-3-WEC (hereinafter "*Orr Ditch*") entered in the United States District Court for the District of Nevada.

II

Truckee-Carson Irrigation District (hereinafter "*TCID*") is an irrigation district duly organized under the laws of the State of Nevada, a party in this case, the operator of the Newlands Reclamation Project under the terms of a written contract with the United States, and the duly authorized representative of the Newlands Project farmers in matters concerned with the Project, including disputes with the Department of the Interior as to the proper method to be used for the classification of lands as bench lands or bottom lands under the provisions of the final decrees in the *Alpine* and *Orr Ditch* cases.

III

On or about March 13, 1986, Interim Operating Criteria and Procedures (hereinafter "OCAP") were issued for the Newlands Reclamation Project. These interim OCAP were unsigned and TCID has no information as to who, if anyone, in the Department of the Interior prepared the OCAP or directed that they be issued, and TCID alleges that those unsigned interim OCAP are not enforceable as rules and regulations or at all. Those OCAP provide in part that:

> The Bureau's bench and bottom land classification maps as they currently appear and as they may later appear with periodic updates, will be used in making the determination of the maximum quantity of water to be delivered to any parcel of land. If at any time TCID disputes any aspect of those maps, TCID shall promptly institute proceedings in the *Alpine* and *Orr Ditch* court to obtain a resolution of such dispute.

A copy of those OCAP is attached hereto and incorporated herein as Exhibit A.

IV

TCID alleges that the Bureau's bench and bottom land maps are arbitrary and unreasonable. For example, the Bureau's assumed contribution to crop consumptive use from the ground

water table will not occur in many instances. To a significant degree, the Bureau's bench and bottom land classification maps are based on 1975 Soil Conservation Service soils mapping which not only are inappropriate for these detailed bench and bottom land classifications, but which have been improperly interpreted by the Bureau. The measurements of the water tables used by the Bureau in its bench and bottom land classifications are not current and are insufficient and imcomplete. The Bureau underestimates crop consumptive use, uses a ground table depth that has recently been charged and is not justified. The Bureau's bench and bottom land classification criteria necessitates continual reclassifications and is unworkable.

V

Historically when the Bureau operated the project (prior to 1927) and when TCID operated the project (from 1927 to date), certain lands have been classified as bench lands, and have received the 4.5 acre foot per acre entitlement established for bench lands in the *Alpine* and *Orr Ditch* decrees. The 4.5 acre feet per acre entitlement has been beneficially used on and is required for the reasonable and economical irrigation of crops on those lands. The Bureau's bench and bottom land maps reclassify approximately 9,066 acres of those bench lands as bottom lands thereby reducing the acre foot water entitlement to 3.5 acre feet per acre. If TCID is required to deliver only 3.5 acre feet per acre to those lands, there will not be sufficient water to reasonably and economically irrigate the crops on those lands and the provisions of Section 8 of the Reclamation Act, 43 U.S.C. § 372, which require beneficial use to be the "basis and the measure" of all project water rights will be violated.

VI

The historical classification of bench lands on the project has developed over the years and is based on many factors including site topography, soils, water table occurrences and duration, including degree of fluctuation, and the actual observed irrigation of a field and comparable fields. TCID alleges that it is reasonable

classification and is consistent with the beneficial use standard of both Section 8 of the Reclamation Act and Nevada law.

VII

The project farmers purchased or acquired for consideration the project water rights that are appurtenant to their lands from the United States. They own these water rights and the unsigned interim OCAP directive that TCID use the Bureau's bench and bottom land classification maps to determine the quantity of water to be delivered to their land usurps the responsibility of the court in the *Alpine* and *Orr Ditch* cases, deprives the project farmers of their property without due process of law, and is an improper and unlawful.

VIII

Most of the project farmers who will suffer a reduction in water deliveries to their project lands under the Bureau's bench and bottom land classification purchased those project lands in good faith and in reliance upon the permanence of the water right allocation that have been given to those lands. Those water right allocations have been followed and accepted by the Bureau and by TCID in the delivery of project water to those lands for over fifty years, and those water right allocations are property rights which the Department of the Interior is estopped to impair by the unilateral adoption of OCAP.

WHEREFORE, TCID prays:

1. For a declaration that the Bureau's bench and bottom land classification maps are arbitrary and unreasonable and not enforceable.

2. That TCID's delivery of water to the project farmers shall be based on the historical deliveries until further order of this court.

3. That the Department of Interior is estopped from impairing water right allocations reasonably relied upon by the project farmers.

4. For such further relief (other than money damages) as the court may deem proper.

DATED: May 23, 1986

LYMAN MCCONNELL
FREDERICK G. GIRARD
KRONICK, MOSKOVITZ
TIEDEMANN & GIRARD

By FREDERICK G. GIRARD
Frederick G. Girard

Exhibit A

These Operating Criteria and Procedures (OCAP) are being issued by the Department of the Interior which is in the process of promulgating revised OCAP for the Newlands Project. Until these revised OCAP are issued, the Department is providing interim OCAP for immediate implementation. These interim OCAP are consistent with the *Orr Ditch* and *Alpine* Decrees and their implementation will allow the Secretary of the Interior to fulfill his responsibility to supply the Newlands Project with water to meet valid rights while minimizing diversions from the Truckee River. These interim OCAP shall be implemented in cooperation with the Federal Water Master and will govern all diversions and use of the facilities on the Newlands Project during this interim period.

These OCAP consist of criteria to define the amount of water the Newlands Project may receive and the timing of diversions from the Carson and Truckee River to meet the decreed water rights requirements of the Newlands Project. Procedures are included to monitor water use and Project operations and enforcement measures and procedures are specified to ensure the criteria are met.

This interim OCAP sets maximum allowable diversion based on the acres of eligible Project land, water duties per acre, and the target efficiency of the Project water delivery system.

The diversion criteria are designed to minimize impacts on cui-ui spawning in the Lower Truckee River and still provide legal water entitlements to each water right holder in the Newlands Project.

Enforcement procedures in the OCAP are developed to ensure that the Project facilities are operated by TCID in accordance with the allowable diversion factors and the diversion criteria.

1. *CONDITIONS FOR WATER DELIVERY.* For the purpose of these OCAP, water delivery is categorized as irrigation or domestic and other uses. This section of the OCAP reviews the conditions under which these two types of water deliveries may be

made, and when delivery is prohibited. TCID shall deliver water only:

- To Project land which at the time of delivery has a valid water right and is classified as irrigable (called herein "eligible Project land"); and

- For domestic and other uses authorized pursuant to the *Orr Ditch* and *Alpine* decrees.

A. *Irrigation Deliveries.* Project irrigation deliveries may be made only to eligible Project land. Eligible Project land is that land within the Newlands Project which: (i) has a valid water right; and (ii) has been classified as irrigable utilizing Bureau of Reclamation (Bureau) land classification standards or has paid out water right. Eligible land may receive the quantity of water which may be beneficially used on it, but not more than the amount in acre-feet per acre per year established as maximum farm headgate delivery allowances by the *Orr Ditch* and *Alpine* decrees.

TCID's water right maps will be used as the basis for determining lands which have a valid water right. Corrections will be made on these maps to account for water right transfers approved by the Nevada State Engineer.

In order to be eligible for irrigation deliveries, lands that do not have a paid out water right must be classified as irrigable according to Reclamation Instructions Series 510.

The acreage irrigated will be determined from recently sensed images of the Project to be acquired and processed by the Bureau. These images will be acquired using video infrared cameras during overflights in late May and from satellite infrared photographs that will be taken in late May, early July and late August. Images were taken in May and June of 1985. In processing the images, the location and number of acres of land irrigated in the Project will be identified. Possible irrigation of nonwater-righted lands also will be identified through the use of the imagery. The Bureau will supply this information to TCID. The District will be responsible for field checking potential violations and stopping

delivery of Project water to lands without water rights that are found to be irrigated with Project water.

The water duty as assigned by the *Orr Ditch* and *Alpine* Decrees is a maximum of 4.5 acre-feet per acre per year for bench lands, and a maximum of 3.5 acre-feet per acre per year for bottom lands. Water duties for crops other than alfalfa may be determined by the Federal Water Master to be lower than 3.5 and 4.5 acre-feet per acre. Should the Water Master make such a determination, the crop water duties shall be adjusted accordingly. All water use also is subject to the test of beneficial use pursuant to Nevada State law. The Bureau's bench and bottom land classification maps as they currently appear and as they may later appear with periodic updates, will be used in making the determination of the maximum quantity of water to be delivered to any parcel of land. If at any time TCID disputes any aspect of those maps, TCID shall promptly institute proceedings in the *Alpine* and *Orr Ditch* court to obtain a resolution of such dispute.

The total annual water duty to fields with a mixture of bench and bottom lands shall be a weighted average calculated as 3.5 acre-feet per acre, multiplied by the acreage of bottom lands, plus 4.5 acre-feet per acre multiplied by the acreage of bench lands.

B. *Domestic and Other Uses.* Domestic and Other Uses of Project water are as defined by the *Orr Ditch* and *Alpine* decrees.

The District shall monitor and keep records for all domestic and other uses. The District shall submit these records to the Bureau, showing the purpose and amount of water usage for each entity.

C. *Prohibited Delivery.* The District shall not deliver water nor permit its use except as provided for herein, and it shall prohibit any water use that does not meet the conditions specified herein. The District shall ensure that its actions and use of water on the Newlands Project do not result in waste of water as defined by Nevada water law.

D. *Maximum Allowable Diversions.* The project-wide allowable diversions for the 1986 water year are 350,000 acre-feet, if available, measured at the gaging station below Lahontan

(except for uncontrollable spillage and precautionary drawdown from Lahontan Reservoir) and at diversion points along the Truckee Canal. This amount shall be adjusted by the Department based on: the remote sensing imagery to be undertaken during the 1986 irrigation season; the analysis of the outflow program described herein; ultimate decisions concerning the use of Project water in the Fallon Naval Air Station; subsequent decisions concerning transfers of Project water rights; the 1986 cropping pattern; and water use for domestic and other purposes. It is not the intention of this interim OCAP to result in the impairment of crop yield to any individual water right holder whose water use complies with his decreed entitlement. Accordingly, additional water will be available for delivery to meet decreed entitlements as they occur.

E. TCID shall ensure that deliveries to the farm headgates and all deliveries to the lands of individual water users do not violate the requirements of this program.

1) All diversions from the Truckee Canal and releases from Lahontan Reservoir shall be limited to the quantity of water necessary for the water deliveries authorized by paragraphs (A), (B), and (C) above.

2) TCID shall make every reasonable effort to achieve efficiencies of 60 percent on the Carson Division and 72 percent on the Truckee Division in 1986 by increased monitoring and improved water management in accordance with the water management and conservation program outlined in part F.

II. *ELIGIBLE ACRES AND DIVERSION MONITORING.* The interim OCAP (1) establish procedures to determine the amount of water to be diverted from the Truckee and Carson Rivers; (2) provide the methods of calculating the diversions; and (3) establish the criteria for diversion of Truckee River water to help meet that requirement. OCAP are designed to minimize diversions from the Truckee River and spills from Lahontan Reservoir, yet provide an adequate water supply and carryover storage in Lahontan Reservoir to meet the water duties for land which is eligible to receive water from the Newlands Project. The

initial determination of eligible acres is based on verification of eligible acres for 1985 and will be modified as stated below:

- Eligible acres will be modified to adjust for transfers of water rights as documented by the District and approved by the State Engineer, and for Bureau land classification results.
- Domestic and other uses will be adjusted as documented by the District.

The Project diversions will be monitored by measuring flows at key locations and at selecting monitoring sites. Specifically, the monitoring of the Project diversions will consist of adding flows measured at:

- Truckee Canal near Wadsworth—U.S. Geological Survey (USGS) gauge number 18851300;
- Carson River below Lahontan Dam—USGS gauge number 10312130; and
- Rock Dam Ditch near the end of the concrete lining; and subtracting,
- Flows measured at Truckee Canal near Hazen—USGS number 10351400;
- Flows measured at Carson River below Fallon and Sagouspe Dam for satisfying water rights outside of the TCID boundaries—USGS page number 10312280;
- Estimated seepage losses in the Truckee Canal; and
- Spills and precautionary releases at Lahontan Dam that are made in conformance with approved criteria.

III. *OPERATIONS AND MANAGEMENT*

A. *Diversions at Derby Dam.*—Increases in canal diversions which would reduce riverflow below Derby Diversion Dam by more than 20 percent in a 24-hour period will not be allowed when Truckee River flow, as measured by the gage below Derby Dam, is less than or equal to 100 cubic feet per second (cfs).

B. *Diversions through the Truckee Canal to the Truckee Division.*—Sufficient water, if available, shall be diverted into the

Truckee Canal to meet the direct irrigation requirements of the Truckee Division.

C. *Truckee Canal Deliveries into Lohantan Reservoir.*—The District will operate the Truckee Canal to hold the average terminal flow to 20 cfs or less (goal is 12 cfs) during times when diversions are not allowed. The District may serve the Rock Dam Ditch from the Truckee Canal only with prior approval of the Bureau's Project Manager, Lahontan Basin Projects Office.

D. *Diversions free the Truckee Canal into Lahontan Reservoir or into the Carson River.*—During the months of January through June, Truckee River Diversions to Lahontan Reservoir will be based on forecasts of April through July runoff made by the Soil Conservation Service (SCS) for the Carson River at Fort Churchill as follows:

- When an official SCS forecast is issued, a target Lahontan Reservoir end-of-month storage will be calculated using the following relationship:

$$TSCH = TSM/J = (C1 + AJ) + L + (C2 + CDT)$$

where:

TSCH = current month end-of-month target storage for Lahontan Reservoir.

TSM/J = current month end of May/June Lahontan reservoir target storage.

(C1 + AJ) = forecasted inflow for the period, current month through May or June; with AJ being the SGS April through July runoff forecast for the Carson River at Fort Churchill and C1 being an adjustment coefficient.

L = an average loss from current month through May or June.

C2 + CDT = projected Carson Division demand from current month through May or June; with CDT being the Carson Division target diversion based on eligible acres in 1985 and C2 being the estimate of the portion of the target diversion to be delivered during this period.

for first-of-month computations, values for TSM/J, C1, C2, and L are defined in Table 1. For other than first-of-month computations; the values for C1, C2, and L should be adjusted appropriately (i.e., prorated).

- The Lahontan Reservoir target storage for that month will be the lowest of the May calculation, the June calculation or full reservoir.

During July through October, the District will divert only through the Truckee Canal into Lahontan Reservoir or into the Carson River in accordance with Table 2.

During the months of November and December, the District will take diversions through the Truckee Canal into Lahontan Reservoir or into the Carson River in accordance with Table 3.

Table 1. Monthly Values for Target Storage Computations

	Jan.	Feb.	March	April	May	June
TSM/J	230.0	245.0	280.0	290.0	290.0	290.0
C1/May	0.836	0.716	0.584	0.392	—	—
C1/June	1.166	1.046	0.915	0.723	0.330	—
L/May	22.8	21.8	17.6	10.4	—	—
L/June	33.5	32.5	28.3	21.1	10.7	—
C2/May	0.30	0.30	0.28	0.18	—	—
C2/June	0.47	0.47	0.45	0.35	0.17	—

TSM/J = current month end of May/June Lahontan Reservoir target storge (1,000 acre-feet)

C1 = an adjustment coefficient for forecasted flows

L = average loss from current month through May or June (1,000 acre-feet)

C2 = an adjustment coefficient for projected Carson Division demand from current month through May or June.

Table 2. Limits of Diversion from Truckee Canal into Lahontan Reservoir or Carson River

Operating Month	Lower Limit(1)		Upper Limit(1)	
	Elevation m.s.l. (ft)	Storage (1000 acre-ft)	Elevation m.s.l. (ft)	Storage (1000 acre-ft)
July	4158.3	255.3	4158.7	259.2
August	4157.7	199.4	4152.1	202.4
Sept.	4146.3	163.2	4146.7	165.6
October	4141.4	135.2	4141.8	137.3

(1) Diversions shall be started only when water surface elevation is forecast to fall below the lower limit, and will be discontinued when storage is forecast to match the upper limiit at the end of the month.

Table 3. Lahontan Reservoir Storage Limitations for Modified Forecasting Criteria

Continue Truckee Canal diversion to Lahontan Reservoir when water surface elevation is less than upper limit(1)

Operating month	If accumulated precipitation for October 1 to the first of the current month at Tahoe City, (TC), California, is: (inches)	Lower limit		Upper limit	
		Elevation (m.s.l. (ft)(1))	Storage (1,000 acre-feet)	Elevation (m.s.l.(ft))	Storage (1,000 acre-feet)
November ..	TC <4.5	4145.0	155.4	4145.1	156.0
	4.5<TC<9.0	4134.2	100.0	4134.6	101.7
	TC >9.0	4127.9	75.0	4128.3	76.4
December...	TC <6.0	4151.1	195.0	4151.5	197.9
	6.0<TC<9.0	4147.4	170.0	4147.8	172.5
	TC >9.0	4131.6	89.9	4132.2	91.4

(1) Diversions started only when water surface elevation is forecast to fall below the lower limit and will be discontinued when storage is forecast to match the upper limit at the end of the month.

E. *Releases for Other Than Newlands Project Purposes*

All uses of water for power generation will be incidental to diversions or deliveries made for irrigation or domestic and other purposes, except for authorized precautionary releases from

Lahontan Dam when power generation using such water is allowed.

The District will release sufficient water to meet the vested water rights below Sagouspe Dam as specified in the *Alpine* decree. Much of the time, these water rights will be met by return flows. However, releases for these water rights will in no case exceed 1,300 acre-feet per year. This release will not be considered part of the District's total entitlement since these water right lands are not part of the Project.

Precautionary releases from Lahontan Reservoir for flood control are no longer required for day safety purposes. The District shall write to the Bureau's Lahontan Basin Projects Office requesting authority for precautionary drawdown to limit potential flooding along the Carson River. Such requests will include all data necessary for the Bureau to make a decision on granting of such authority. Any uncontrolled spill or authorized precautionary drawdown from Lahontan Reservoir will not be charged to the entitlement.

Project facilities shall not be used for conveyance of non-Project water without a Warren Act contract (36 Stat. 925, 43 U.S.C., 523), with the exception of water for which rights are specifically referenced in the Truckee River Agreement of 1935, as incorporated into the *Orr Ditch* decree.

F. *Water Management and Conservation*

To supplement the water management and conservation requirements of this interim OCAP, Reclamation and TCID will implement through a cooperative effort the Newlands Water Management and Conservation Program. The overall goal of this program is to promote efficient management of water in the Project. This goal will be accomplished by documenting and evaluating existing techniques, by implementing improvements to the water management practices presently in use on the Project, and by evaluating and where practical, implementing physical changes to Project facilities which could affect overall project efficiencies. The program will analyze existing water ordering and water delivery procedures, and will emphasize developing meth-

ods, including computerization and automation to improve these procedures. An annual report will be prepared at the end of each year which details program accomplishments in the previous year and makes recommendations for the forthcoming year. The 1985 Annual report will be provided to TCID by March 30, 1986, for review and implementation.

The District and Reclamation will share the cost of development for this program over a 4-year period beginning the first water year of implementation of a long-term OCAP. The cost share will be 50 percent for each agency, including materials and labor costs. At the end of the 4-year implementation period, the District will be required to take over and continue this program, assuming sole responsibility for all costs incurred in its implementation.

The primary tasks of the Water Management and Conservation Proxies are:

(1) To measure Project entitlement.

(2) To evaluate and document current water management practices by irrigation block to improve the Project data base.

(3) To determine the system efficiency of the Project facilities by comparison of diversions into the Project area and outflows from the area.

(4) To develop and implement progress to improve system efficiencies.

(5) To determine actual annual delivery rate on the L1-7 Lateral on a per-acre basis.

(6) To improve existing measurement sites and install new sites, as necessary. (Approximately 40 measurement sites have been identified as key locations.)

(7) To identify and evaluate alternative modifications of Project facilities in terms of cost and water savings.

(8) To monitor shallow ground-water levels.

IV. *REPORTING PROCEDURES*

A. *Changes in Irrigated Acreage*—The acreage to be irrigated in the upcoming year will be based preliminarily on the acreage that was irrigated in the previous year as determined through the remote sensing procedures outlined in Section I.A. Any anticipated changes in irrigated acreage from year to year will be reported to the Bureau's Lahontan Basin Projects Office by the District by April 15 of the current water year. On October 15, 1985, TCID was provided with preliminary information on the number of water righted acres that were irrigated in 1985, designated by individual water user parcels. The Bureau is in the process of adjusting these figures to correct for inaccuracies and for water right transfers that have been approved by the Nevada State Engineer. As these adjustments are incorporated into the allocations, the Bureau will provide updated information to TCID for review. TCID shall adjust water allocations to individual water users as provided for in the updated Bureau data.

TCID will provide the individual water users with Bureau data regarding the anticipated irrigated acreage and water allocations for 1986. Any needed adjustments based on changes in lands to be irrigated during the 1986 irrigation season will be reported by the individual water user to TCID. TCID will, in turn, notify the Bureau of any changes in irrigated acreage which must be accounted for in calculating diversions.

B. *Changes in Domestic and Other Uses*—By April 15 of the current water year, the District shall notify the Bureau of all domestic water uses that it has allowed. This notification shall include a detailed explanation of the criteria utilized in allowing the use and sufficient documentation on type of use and amount of use by each water user to demonstrate to the satisfaction of the Bureau that each water user is in compliance with the criteria. With adequate documentation, the District may notify the Bureau of any changes in domestic water requirements at any time during the year, and the target diversions will be modified as appropriate.

C. *Operations Reporting*—By the end of each month, the District shall submit to the Bureau's Lahontan Basin Projects Office monthly reports for the previous month documenting the

total monthly inflow and outflow in acre-feet from the Truckee, North Carson and South Carson Divisions for that month. The report will include records for the gages listed in (11).

V. *COMPLIANCE WITH OCAP*—If the Secretary believes, pursuant to the Nevada legal definition of waste, that waste has occurred; or if the Secretary believes that water deliveries are not being made in accordance with the *Alpine* and *Orr Ditch* decrees, or Reclamation Law, TCID will be notified in writing. The notification will indicate whether the Secretary believes that the alleged violation is because of actions by TCID or by individual water users. If the District fails to rectify the situation or to have the water users rectify the situation, the Secretary shall bring an entitlement action in the *Alpine* or *Orr Ditch* court for resolution, or take over project operations pursuant to the terms of the operating agreement between TCID and the Bureau. The Secretary reserves the right to pursue other remedies including monetary or punitive damages, as appropriate, against individuals who take Project water, but have no right to receive it.

Waste of water may become apparent in reduced Project efficiencies. Repeated failure by TCID to meet target efficiencies can result in takeover of the Project by the Bureau of Reclamation.

Should a landowner believe that the number of eligible acres he is entitled to irrigate is different from that which the Bureau's remote sensing program or bench/bottom maps identify, he is required to notify TCID, and present appropriate documentation regarding the subject acreage. TCID shall record the information and present the claim to the Bureau for further consideration. If the Bureau determines there is sufficient support for the landowner's claim, adjustments will be made in the OCAP calculations of maximum allowable diversion to accommodate the changes requested by the landowner. The Bureau will then reply to TCID with its decision. If the Bureau disallows the landowner's claim, it will so inform TCID in writing. TCID will in turn inform the landowner of the disposition of this claim and the reasons therefor. TCID shall further instruct the landowner that he may present the dispute to the *Alpine* or *Orr Ditch* court for

further consideration if he continues to disagree with the Bureau's findings and conclusions.

All of the water delivery operations of the Truckee-Carson Irrigation District shall be monitored closely be the Bureau of Reclamation. Any and all violations of the terms and provisions of these Operating Criteria and Procedures shall be reported immediately by the District to the Lahontan Basin Project Office of the Bureau of Reclamation.

Appendix G

In the United States District Court
for the District of Nevada
Honorable Bruce R. Thompson, District Judge

D-185-BRT

United States of America,
Plaintiff,

vs.

Alpine Land & Reservoir Company,
Defendant.

TRANSCRIPT OF PROCEEDINGS
JUDGE'S RULING
August 1, 1986
Reno, Nevada

Reported by: TERRI W. SPARKMAN, CSR #210

APPEARANCES:

For the Plaintiff: FRED DISHEROON
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RENO, NEVADA, FRIDAY, AUGUST 1, 1986

THE COURT: Anybody have any afterthoughts?

MR. DISHEROON: None from us, Your Honor.

MR. GIRARD: No, Your Honor.

THE COURT: This has been a very interesting trial. It is much more complicated and much more specific than I anticipated.

The real thrust of the issue presented by the plaintiff's complaint for declaratory relief is whether the secretary, through the Bureau of Reclaimation, had authority, under the Alpine decree, to change water right duties on land in the New Lands Project from either 4.58 acre feet per acre or 3.5 acre feet per acre. There are other incidental aspects of the so called operating criteria, demonstrated by Plaintiff's Exhibit 2.

We have before us a question of whether the secretary can, by careful study and examination, amend or modify a court decree. I don't think that was his intention, but you are suffering under the handicap of presenting the case to the judge who entered the decree in the Alpine case. If anybody knows what was intended by that decree, I think I do. I don't know whether the people upstairs will accept my exposition of what was intended, but I am going to make it.

Throughout the Alpine proceedings, the distinction between bench land and bottom land was just a broad, general distinction between land that was porous soil with low water table, low water holding capacity, as compared with land which generally fell into the group of more impervious soil, higher water table and higher water holding capacity.

When the Alpine decree was entered, the Court had behind it, and relied upon, 50 years of experience under the decree as administered by the Truckee-Carson Irrigation District. It was the intention of the Court to rely on that experience, and to rely upon classification of land in the Newlands project as bench land or bottom land entitled respectively to 4.5 acre feet or 3.5 acre feet per acre in the implementation of the decree itself.

Now, I have learned from the rather aeriodyke expositions of counsel and the testimony of the expert witnesses that there may be reasons given to the Court now why the Court should not have so relied, but there was nothing of that sort before the Court at the time the Alpine trial was held and the decree entered. It was just taken for granted that that classification which was, as I say, just a rough, general classification, properly illustrated by the so called Walker Line, was the standard to be applied in the implementation of the decree itself.

In any examination of this sort you have to have a starting point. The starting point which was intended to be adopted was the distribution of water to bench and bottom lands as was then being done by the Truckee-Carson Irrigation District that is still its starting point.

It is the intention of the Court, under the Alpine decree, that the classification should be general, and it is the intention of the

Court that the classification and allocation of water duties should have considerable permanence and stability.

The approach adopted by the Bureau of Reclaimation violates the Alpine decree, according to my understanding of what was intended. The operating criteria say, in part, if the Bureau's bench and bottom land classification maps as they currently appear and as they may later appear with periodic updates will be used in making the determination of the maximum quantity of water to be delivered to any parcel of land. In another provision, which I don't have marked, it is indicated that those would be subject to change, perhaps on an annual basis. The witness for the Bureau testified it might be on a five-year basis. Even that is too frequent.

I think that the Bureau is making an effort to thrust according to the last half of the century and not the first half. That is a commendable effort.

I think all the witnesses who testified were reliable and honest and in good faith presented their respective positions to the Court. I think that the effort has been gone at the wrong way.

I have considerable difficulty with these TCID serial numbers of parcels of land. They don't seem to relate to anything except a bookkeeping proposition. I think it is arbitrary and unreasonable to rely on those serial number classifications to determine what percentage of water duty between 3.5 and 4.5 should be allocated to any particular parcel, whether it is only five acres, which we have one here that is .58 acres or whether it is 150 acres.

I think it is unreasonable for the Bureau of Reclaimation, under the guise of operating criteria, to place the burden on an individual farmer to decide whether he—whether it is worthwhile for him to undertake the expense, which might be considerable, and put in the time to attempt to change the classification of his land where the water duty has been expressed in a number of plus five decimals. I recognize that not to be a very fair criticism, because as counsel pointed out, this is just the way the computer works. Computers don't solve everything.

When the Alpine decree was entered, it was anticipated that if changes were to be made in the then existing conditions, with

respect to the duty of water on any farm or ranch or portion thereof, the proceedings should be initiated before the water master. Now, I am not going to change that provision until I am shown that I have to, but it frightens me somewhat, because I am afraid he is going to have to develop office personnel substantially equal to the Bureau of Reclamation. That might not be so.

I do think that it is important that when the duty of water to any particular parcel of land is reviewed by the water master, he should take into consideration whether the parcel indicated by the TCID serial numbers makes any practical sense in connection with the way the farmer irrigates his property, and in connection with the facilities available from the district canals to irrigate that property.

I thoroughly agree with the protestations of all counsel that beneficial use of water is what we are interested in, and avoidance of waste of water is what we are interested in. In this instance, in a general way those subjects were all addressed at the time the Alpine case was decided. And with respect to specific instances, the problem, if there is one, should be initiated either by a particular farmer or rancher or by the Bureau or Paiute tribe concerning a specific tract of land.

I am quite surprised and perturbed at some of the evidence I listen to every time we have a case involving the Truckee-Carson Irrigation District. It may have been a maverick in the past among irrigation districts, and paid little or no attention to any authority, whether under court decree or operating criteria promulgated by the secretary. I think that era is past, and in the future we can expect more responsible administration from the irrigation district. I think that the work that the Bureau has done is very important, and it provides information which may be of great benefit to some of the farmers on the project when it is made available. It has been improperly used in this instance when it employed to adjust the water right duties of all the lands in the district, under the criteria adopted many of the water duties was ineffective, perhaps most of them. Nonetheless, that was not the proper function of the secretary, by blanket edict, affects so many thousands acres of land.

I might point out that if I weren't so firmly persuaded in my own mind that this was the correct approach or correct solution to this problem, we might have to have this trial all over again, because Mr. Girard can't sit there and wear two hats, represent both the farmers who had an increase in water duty, and those who had a decrease in water duty. I think the principal function has been to represent those who had a decrease in water duty under the secretary's criteria, and ignore those whose duty of water was increased, whether just artificially, as Mr. Pelcyger suggests, or whether functionally.

In any event, we don't know how the secretary intended for the duty of water to be assessed, charges made to each individual rancher. I think the parcelization down there needs some adjustment. I think that is serious, but I haven't the slightest idea what the practical way is to go about that. It seems to me these properties should be treated on the basis of all of a farmer's adjoining ownership is one farm, entitled to a duty of water which properly fits the conditions of water on that farm. If it is 1,000 acres, and I don't know how big the farms are in Churchill County, but in order to properly assign a duty of water to land as bench land or bottom land, I think it would be much more appropriate to have—determine specific parcels out of that area which would properly be classified as bench lands. That can't be done, as I understand it, by reference to the TCID serial number classifications.

With respect to these irregular areas that the Bureau experts have outlined which should be classified as bottom lands instead of bench lands, and vice versa, to try to satisfy the irrigation requirements from a practical point of view of a particular farmer, on the basis of a weighted average seems to me to be unreasonable and arbitrary. I don't want to suggest that I oppose the Bureau's efforts to properly investigate the soils and the water tables and the other conditions of the Newlands project which may properly affect the irrigation requirements of the project, but at this time, I think that Mr. Pelcyger made the correct statement when he suggested, if I understood him, that if you take into consideration the real meaning of the beneficial use limitation on

water duty, that requires attention to individual parcels and not just an overall view of the project.

I guess the conclusion of what I have said is that in response to the plaintiff's complaint, Petition for Declaratory Relief, I declare that it is the law in this case that the operating criteria promulgated by the Bureau of Reclaimation, which bear upon the classification of bench and bottom lands, are arbitrary and unreasonable and will not be enforced, and that the Truckee-Carson Irrigation District, which has been computerized and was received in evidence as Exhibit 6, will be the starting point for any reclassification of the lands of a particular farmer, and that such reclassification must be done on an individual parcel, and I mean parcel of land, not TCID parcel, at the instigation of either the owner of the farm or the Bureau of Reclaimation or the Paiute tribe.

The counterclaim of the Paiute tribe relating to—attacking the validity only of those reclassifications in the Bureau's operating criteria which increase the duty of water, is moot by the declassification of the criteria.

Anybody else got any problems?

MR. GIRARD: Thank you, Judge.

THE COURT: Do you want to prepare an order?

MR. GIRARD: Yes, I will prepare an order, Judge. Can I ask to have a transcript prepared of your comments?

THE COURT: Sure. You can always ask for a transcript, if you pay for it.

MR. GIRARD: I will pay for it. I will get to it within the next few days, but I have to go back to trial in Sacramento.

THE COURT: We will be in recess.

(Proceedings concluded)

STATE OF NEVADA, }
COUNTY OF WASHOE. } ss:

I, TERRI W. SPARKMAN, Official Reporter for the United States District Court, District of Nevada, do hereby certify:

That on Friday, August 1, 1986, I was present in said Court and took verbatim stenotype notes of the Judge's Ruling had in the matter of UNITED STATES OF AMERICA, Plaintiff, vs. ALPINE LAND & RESERVOIR COMPANY, Defendant, and thereafter my said notes were transcribed into typewriting as herein appears;

That the foregoing transcript, consisting of pages 1 through 9, is a full, true and correct transcription of my stenotype notes of said Ruling, to the best of my knowledge, skill and abililty.

DATED: At Reno, Nevada, this day of , 1986.

TERRI W. SPARKMAN
CSR #210

Appendix H

In The United States District Court
For The District of Nevada

D-185-BRT

United States of America,
Plaintiff,

vs.

Alpine Land & Reservoir Company, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Bench and Bottom Land Issue)

TRUCKEE-CARSON IRRIGATION DISTRICT'S (hereinafter "TCID") Petition for Declaratory Relief came on regularly for trial on July 28, 1986 through July 30, 1986, Frederick G. Girard and Lyman McConnell appeared as counsel for TCID, Fred R. Disheroon and David Kubichek appeared as counsel for the UNITED STATES OF AMERICA and Robert S. Pelcyger appeared as counsel for the PYRAMID LAKE PAIUTE TRIBE OF INDIANS.

At that trial, oral and documentary evidence was received and on August 1, 1986, the cause was extensively argued and the Court having considerd the evidence and the arguments of counsel and being fully advised, enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

The Administrative Provisions of the Final Decree of this Court entered in the case of *United States of America vs. Alpine Land & Reservoir Company, et al.*, Civil No. D-183-BRT (hereinafter the "Alpine" case), provide for the appointment of a Water Master to carry out and enforce the provisions of the Final Decree and direct that disputes as to the adjudicated water rights of the parties shall be first submitted to the Water Master for determination and that any person feeling aggrieved by an action

or order of the Water Master may complain to the Court and the Court shall then promptly review the action or order of the Water Master and make such order as the circumstances warrant. The United States of America, TCID, and the project farmers were parties to that litigation, and bound by the provisions of that Final Decree.

II

In the Final Decree in the *Alpine* case, it was determined that for the Newlands Project the water duties are 3.5 acre feet per acre delivered to the land for the bottom land and 4.5 acre feet per acre delivered to the land for the bench land, and that the individual farmers on the Newlands Project own the water rights appurtenant to their lands.

III

Since 1927, TCID, the operator of the Newlands Project, has classified the project lands as bottom lands or bench lands and this TCID classification for all project lands has been computerized on a map received in evidence in this case as Exhibit 6. This Exhibit 6 reflects the TCID classification of the project bottom lands and the project bench lands. TCID has historically delivered to those lands designated on Exhibit 6 as bottom lands 3.5 acre feet per acre, and to those lands designated on Exhibit 6 as bench lands 4.5 acre feet per acre. Those amounts of water have been used and relied upon by the project farmers who own those lands.

IV

On or about March 13, 1986 Interim Operating Criteria and Procedures (hereinafter "OCAP") were issued for the Newlands Project by the United States. These OCAP directed that the Bureau of Reclamation's recently prepared bench and bottom land maps and the related Bureau computer tabulations of water deliveries be used by TCID in delivering water to the project lands. The evidence shows that 9,066 acres of lands classified as bench lands by TCID were changed to bottom lands by the

Bureau classification, and that 2,699 acres of lands classified as bottom lands by TCID were changed to bench lands by the Bureau classification. Those OCAP also provide if TCID or any project farmer dispute the Bureau of Reclamation's bench and bottom land maps or the amount of water to be delivered to those lands as set forth on the Bureau's related computer tabulation, they must institute a proceeding in the *Alpine* case or the case of *United States of America v. Orr Ditch Company*, No. A-3-WEC (hereinafter the "Orr Ditch" case), to obtain a resolution of that dispute. This court finds that it was arbitrary and unreasonable for the United States to change by OCAP the bench and bottom land classifications and the water deliveries to the project lands that have been relied upon by the project farmers for years, and to place the burden on the individual farmers who own those lands and water rights appurtenant thereto to commence and finance litigation in an attempt to change the Bureau's classification and the Bureau's related computer tabulations of water deliveries for those lands.

V

At the time the Final Decree in the *Alpine* case was entered, this court intended that (1) TCID's classification of the bench and bottom lands in the Newlands Project be the starting point in determining the appropriate water deliveries to each individual farm, (2) that any person or entity who felt that TCID's classification of bench and bottom lands and/or TCID's water deliveries to any individual farm were improper should petition the Water Master and request a change in that classification and/or those water deliveries, (3) notice of that petition would be given to the individual farmer and to TCID, (4) the Water Master in acting upon that petition would consider all relevant factors such as water tables, soils and their water holding capacities, farming practices, and the types of crops being grown and determine if that farmer's overall use of water on that particular farm was wasteful or resulted in a non-beneficial use of water and if so, change the TCID classification and/or adjust the water deliveries accordingly, and (5) any person or entity feeling aggrieved by the action or order of the Water Master could appeal to the court who

would then review that action or order of the Water Master and make such further order as the circumstances warranted. This court finds that this is the procedure that shall be followed in any bench and bottom land reclassification of any individual farm on the Newlands Project and/or in determining the amount of water that is to be delivered to that individual farm.

VI

The amounts of water to be delivered to the project farms pursuant to the OCAP were computer tabulated by the Bureau and were directed to TCID serial numbered parcels which were not shown to be compatible with reasonable farming units. The Bureau's bench and bottom land classifications often resulted in their being both bench and bottom lands, irregularly shaped, within a given serial numbered parcel, and in those instances a computer tabulated weighted average water delivery for that serial numbered parcel was used. This Court finds that it was arbitrary and unreasonable to use TCID serial numbered parcels in arriving at the computer tabulated water deliveries for the project lands and to change the decreed water right deliveries for project lands of 3.5 and 4.5 acre feet per acre to weighted average water deliveries which are not 3.5 or 4.5 acre feet per acre.

VII

The Bureau's classification of bench and bottom lands was based primarily on the depth and duration during the irrigation season of the water table and would be subject to frequent revision and change, particularly as to those lands where the water table fluctuates at or near six feet during the irrigation season. This Court finds that a classification of bench and bottom lands should be relatively permanent and stable and that the Bureau's classification which would not in many instances be known with certainty until the latter part of any irrigation season and would be subject to frequent revision and change is arbitrary and unreasonable.

CONCLUSIONS OF LAW

I

That this court has jurisdiction of the parties and the subject matter pursuant to the continuing jurisdiction provisions of the Final Decrees in the *Alpine* and *Orr Ditch* cases, and 28 U.S.C. §§ 1331 and 1361 and 5 U.S.C. § 702.

II

That any conclusions of law that may appear in the foregoing findings of fact are hereby incorporated herein by reference.

III

The Interim Operating Criteria and Procedures issued on or about March 13, 1986, which bear upon the classification of bench and bottom lands are arbitrary, unreasonable and invalid and will not be enforced.

IV

The TCID classification of bench and bottom lands which has been computerized and is reflected on Exhibit 6, received in evidence in this case, shall be the starting point for any future reclassification of the lands of a particular project farm and any such reclassification and/or adjustment in water deliveries must be done on an individual farm basis in a proceeding commenced before this court's Water Master as provided by the Administrative Provisions of the Final Decree in the *Alpine* case, and that either the owner of the farm, the Bureau of Reclamation, or the Pyramid Lake Paiute Tribe of Indians may initiate such a proceeding.

V

In light of the court's determination that the Interim Operating Criteria and Procedures issued on or about March 13, 1986, which bear upon the classification of bench and bottom lands are arbitrary, unreasonable, and invalid and will not be enforced, the Cross-Claim of the Pyramid Lake Paiute Tribe of Indians is now moot.

DATED: September 11, 1986.

BRUCE R. THOMPSON
United States District Court Judge

Appendix I

In the United States District Court
for the District of Nevada

D-185-BRT

United States of America,
Plaintiff,

vs.

Alpine Land & Reservoir Company, et al.,
Defendants.

ORDER
(Bench and Bottom Land Issue)

The trial having been held before this court and the court having entered its Findings of Fact and Conclusions of Law and being fully advised in the premises, NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Interim Operating Criteria and Procedures issued for the Newlands Project on or about March 13, 1986 which bear upon the classification of bench and bottom lands are arbitrary, unreasonable, and invalid and will not be enforced; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that TCID's classification of bench and bottom lands which has been computerized and is reflected on Exhibit 6, received in evidence in this case, shall be the starting point for any future reclassification of the bench and bottom lands on the Newlands Project and that any such reclassification and/or adjustments in water deliveries must be done on an individual farm basis in a proceeding commenced before this court's Water Master as provided by the Administrative Provisions of the Final Decree in the case of *United States of America v. Alpine Land & Reservoir Company*, Civil No. D-183-BRT, and that either the owner of the farm, the Bureau of Reclamation, or the Pyramid Lake Paiute Tribe of Indians may initiate such a proceeding; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Cross-Claim of the Pyramid Lake Paiute Tribe of Indians is now moot and is hereby dismissed.

DATED: September 11, 1986

BRUCE R. THOMPSON
United States District Court Judge

Appendix J

In the United States District Court
for the District Of Nevada

D-185 BRT

United States of America,
Plaintiff,

vs.

Alpine Land & Reservoir Company, et al.,
Defendants.

ORDER FOR RECONSIDERATION

The court has this day signed and filed the Findings of Fact and Conclusions of Law and Order which have been very well drafted by counsel for the TCID in accordance with the court's oral ruling on August 1, 1986. On August 8, 1986, The Pyramid Lake Paiute Tribe (Tribe) filed a motion for reconsideration and revision of the court's oral ruling. On August 25, 1986, the TCID responded and opposed the motion. On September 5, 1986, the United States responded and joined the Tribe's motion.

"The Tribe urges the Court to revise that portion of the Court's ruling . . . by recognizing the validity of the 1927 Walker line along the 3980 contour elevation for bench-bottom land classification purposes." This is ridiculous. In its oral ruling, the court alluded to "the so-called Walker line" merely as illustrating the rough, general nature of the classification of bench and bottom lands, a concept which had been thereafter effective for fifty years. And the court expressed the intention that the results of that fifty years of experience should be the starting point for any reclassification of lands irrigated in the Newlands Project.

The fact that the bench and bottom land classifications were not in issue at the trial of the Alpine case was not an oversight. In that trial the attorneys for the Government made every conceivable argument to diminish the appropriative rights of the Newlands Project water users including: (1) that the project water rights were owned by the United States; (2) that the duty of water was limited by statute to 3 acre feet per acre; (3) that the duty of water was limited by contract to 3 acre feet per acre; and (4) that

the evidence proved that 3 acre feet per acre was reasonably sufficient to grow alfalfa on *all* project farm lands, inferring that no distinction should be made between bench and bottom lands. If the United States had believed that a change in the historical classification of bench and bottom lands would have effectuated a substantial reduction of water allocated to the Newlands Project for beneficial use, it would undoubtedly have so contended. By contrast, it adopted the status quo ante on this issue.

There is only one contention in the motion for reconsideration which causes concern. Both the Tribe and the Government contend that when the decree was entered in the Alpine case on October 28, 1980, only 9,005 acres of Newlands Project lands were classified as bench lands with a water duty of 4.5 acre feet per acre, whereas on August 1, 1986, the evidence showed that 16,133 acres were so classified. The computerized map (Ex. 6) of TCID land classifications was, on this trial, used by all parties and presented to the court as a correct embodiment of TCID records. No particular point was made of the date as of which the exhibit spoke. If the contention of the Tribe and the Government is correct, however, it appears that somehow between October 28, 1980 and August 1, 1986 the acreage of project lands classified as bench lands increased by 7,128 acres. Yet, we have in evidence Exhibit 38, a list of Requests for Increase in Irrigation Allocation/Water Duty from 1970 to present which shows that during that 15-year period only 453.65 acres had been increased to 4.5 acre feet per acre and only 57.5 acres were so increased after 1980. The latter figure would plainly be de minimis.

Either counsel are not now being completely fair and candid with the court, or the court has been fraudulently misled.

So, we'll have another hearing to find out what the status of the bench-bottom land classification was on October 28, 1980. Pending the hearing any party may pursue any discovery he, she or it deems appropriate.

Accordingly,

IT HEREBY IS ORDERED that the motion for reconsideration is granted and a hearing will be held on Monday, the 3rd day of November, 1986, at 9:30 a.m. to determine whether or not Exhibit 6 correctly identifies the bench and bottom lands in the Newlands Project as of October 28, 1980 and, if not, what adjustments need be made.

DATED September 11, 1986.

BRUCE R. THOMPSON
United States District Judge

Appendix K

In The United States District Court
for the District of Nevada

D-185-BRT

United States of America,
Plaintiff,

vs.

Alpine Land & Reservoir Company, et al.,
Defendants.

REMAND ORDER

On August 1, 1986, after a three day hearing held to review the bench and bottom land criteria and map proposed by the Secretary of the Interior for use in the Newlands Project, this court in a bench ruling concluded that the manner in which the criteria utilized by the Secretary was applied to the irrigable lands in the project was unreasonable and arbitrary in (1) relying upon the Truckee-Carson Irrigation District's (TCID) serial numbers to designate the tracts in the project which held water rights, (2) establishing a weighted average water duty for many of those tracts, and (3) lack of stability and permanence. Accordingly, the court ordered that the Secretary's criteria which bear upon the classification of bench and bottom lands were arbitrary and unreasonable and would not be enforced.

Pursuant to that bench ruling, TCID submitted proposed findings which were adopted by the court by Order dated September 11, 1986. In that Order the court also ordered that TCID's classification of bench and bottom lands as reflected in Exhibit 6 in this proceeding should be the starting point for any future reclassification of the bench and bottom lands on the Newlands Project, and that any reclassification must be done on an individual farm basis in a proceeding before the court's Watermaster.

Prior to entry of that Order, on August 7, 1986, the Pyramid Lake Paiute Tribe filed a motion for reconsideration of the court's August 1, 1986 bench ruling. On September 5, 1986, the United States joined the Tribe's motion. The essence of those motions was that Exhibit 6 did not reflect TCID's actual practices in

classifying bench and bottom lands in the Newlands Project. By Order also dated September 11, 1986, the court granted that motion and set a hearing to determine whether or not Exhibit 6 correctly identifies the bench and bottom lands in the Newlands Project as of October 28, 1980, and if not, what adjustments need be made.

A further hearing was held by the court on January 9, 1987, after allowing time for full discovery into TCID's actual practices. At that hearing, the United States presented uncontradicted evidence that Exhibit 6 did not represent an historic classification of lands in the Newlands Project as bench or bottom lands. Exhibit 6 reflected TCID's historic water allocations to project lands based ultimately upon the average uses of water on such tracts during the full water years from 1925 to 1932. Exhibit 6 reflected a reduction by TCID in 1977 for tracts with water duties above 4.5 afa to an allocation of 4.5 afa. TCID never made land or soil-based classification of bench or bottom lands in the project. The 3980' contour line (as described by A.W. Walker in 1927) has (perhaps not coincidentally) reflected the approximate dividing line between tracts with higher and tracts with lower water allocations within the Newlands Project. As a result, the water right holders in the Newlands Project have come to perceive the 3980' contour line as the general basis for classifying water allocations in the project. The water allocations provided by TCID and currently depicted on Exhibit 6 were not based on bench and bottom land classifications. The court's earlier conclusion that Exhibit 6 should be a guide in classifying lands within the project is withdrawn.

The court continues to believe that the classifications made by the Secretary based upon his bench and bottom criteria are deficient in the respects hereinabove noted. The court is now of the opinion that the Secretary should be allowed an opportunity to correct the deficiencies in his application of the soil and water table criteria to the farms in the project in a manner that is consistent with the court's explanation of the intent of the Alpine decree as stated in the August 1, 1986 bench ruling. Considering the foregoing, the court now enters the following order:

IT IS ORDERED, ADJUDGED AND DECREED, after consideration of the motions for reconsideration filed herein by the Pyramid Lake Paiute Tribe and the United States, that the second paragraph of the Order entered on September 11, 1986 is vacated and that this matter is remanded to the Secretary of the Interior, and he is directed to prepare and submit to the court a revised initial designation of bench and bottom lands in the Newlands Project. Such designation shall be served and filed within 180 days from the date of this order.

In preparing this revised designation, the Secretary shall take into account the following matters reflecting the intent of this court in issuing the Alpine decree: (a) The distinction between bench and bottom lands must be a broad, general distinction between land having porous soils with lower water tables and low water holding capacities as compared to lands with more impervious soils, higher water tables, and higher water holding capacities. The court recognizes that the basic criteria identified by the Bureau in its report filed herein as Exhibit 1 generally reflect this distinction; (b) the classification of lands as bench and bottom for allocation of water duties must be designed for considerable permanence and stability. The Secretary should take into account the past general designation of such lands in the project as reflected by the 3980′ contour line; and (c) TCID's serial numbered parcels should not be used as identifying irrigation units. The Bureau should provide a new designation system which will identify and recognize practical farming units reflecting good irrigation practices with the available facilities.[1] Weighted averages will not be used.

After such designation is filed herein, any party hereto shall have 30 days in which to file objections.

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[1] This does not mean that *all* of a farmer's ownership, wherever located, will have one classification, but those which are located together and irrigated as a single unit should have the same designation.

For the 1987 irrigation year, the court directs that TCID's current allocation map (Exhibit 6) shall continue to be used to describe the maximum allocation to be allowed to each eligible farmer in the Newlands Project.

DATED January 27, 1987.

BRUCE R. THOMPSON
United States District Judge

Appendix L

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In the United States District Court
for the District Of Nevada

D-185 BRT

The United States of America,
Plaintiff,

v.

Alpine Land and Reservoir Co., *et al.*,
Defendant.

SUBMISSION OF REVISED BENCH AND BOTTOM LAND MAP FOR THE NEWLANDS RECLAMATION PROJECT

By order of January 27, 1987, this Court ordered the Secretary of the Interior to prepare and submit to the Court a revised initial designation of bench and bottom lands in the Newlands project. Submitted herewith is a letter from the Principal Deputy Assistant Secretary of Interior with enclosures which are tendered for filing in accordance with the Court's order. The enclosures include a map showing revised bench and bottom designation, an explanatory report and a computer listing of the farms so designated on the map.

The revised designations utilized the general criteria for designating bench and bottom land set out in plaintiff's Exhibit No. 1 in this proceeding (Bench and Bottom Department of Bureau of Reclamation dated September 1985). These criteria state that first, if the available water holding capacity of the soil is eight inches or greater in the five foot soil profile, the soil is considered bottom land. Second, if the water table is within six feet of the soil surface for 150 or more days during the irrigation season, the soil is considered bottom land. If neither of these two conditions apply, the soil is considered bench land.

In applying these general criteria to each particular tract of land, the Bureau applied the directives of the Court in the remand order. We believe the attached report fully complies with the provisions of the remand order and therefore, respectfully request the Court, after its review, to approve the revised designations and order that they be utilized as the identification of bench and bottom lands in the Newlands project, beginning in the 1988 irrigation season, except where later modified in appropriate individual cases by order of this Court.

Respectfully submitted,

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Dated: July 23, 1987

The Remand Bench and Bottom Land Map for the Newlands Project Fallon, Nevada

This report summarizes the process used by the Bureau of Reclamation to produce a bench and bottom land map of the Newlands Project pursuant to a remand order issued by Judge Thompson, Reno Federal Court, District of Nevada, on January 27, 1987. This supplements the report "Review of the Proposed and Historical Bench and Bottom Land Designations in the Newlands Project Fallon, Nevada" dated September 1985. That report was introduced as Exhibit 1 in a hearing decided by Judge Thompson on August 1, 1986. The attached remand order reviews related developments from August 1, 1986 through January 27, 1987.

Under the January 27, 1987 remand order the Secretary of the Interior was allowed 180 days to prepare and submit to the court a revised initial designation of bench and bottom lands in the Newlands Project. In preparing the revised designation (remand map), the factors listed in the remand order were taken into account.

In developing the remand map the goal was to broaden and generalize the Bureau bench and bottom land map (1985 map) presented in Exhibit 1 to conform with the remand order. The new designations were made so that individual irrigated fields would be designated as either all bench land or all bottom land. Since the remand order required a broad and general distinction using the criteria developed in Exhibit 1 small soil areas were lumped together with the predominate soil condition in an area.

When applying the water table and soil texture criteria developed in Exhibit 1, the 3,980 foot contour line was used to designate bench and bottom lands when other information was indeterminate. The 3,980-foot contour line, which is known as the Walker line, was drawn by the Bureau in 1927 to define bench and bottom lands after the Talbot Decree was put into effect. The Walker line was based on knowledge of the soil conditions at that time and represented the transition from bench lands to bottom lands.

In developing the remand map, the soil logs and water table data gathered by the Bureau since 1984 were reviewed, along with the Fallon-Fernley Soil Survey and the 1984 infrared aerial photography. The boundaries between bench and bottom lands were taken as the quarter-quarter section or lot boundaries to assure that individual fields did not receive differing designations. Land far from the 3,980-foot contour line are assigned the corresponding unit water duty.

The aerial photos were used to identify field boundaries, barren dune land, and the proximity of fields to canals, drains, and marsh areas. On the 1985 map, many small areas below the 3,980 foot contour line were designated as bench land. However, upon examining the aerial photos, it is apparent that those small areas are nonirrigated hills, dunes and urban areas, and are therefore designated as bottom land on the remand map. On the 1985 map, many small areas above the 3,980 foot contour line were designated as bottom land. Upon examining the aerial photos, those small areas are identified as marsh areas and urban areas that are not irrigated, and are therefore designated as bench land on the remand map.

The subsurface drainage conditions were also considered in developing the remand map. Those conditions include water table depth, barrier depth, soil profile textures, and proximity to drains, canals, marshes, and water bodies. The principles of drainage and the doctrine of beneficial use require that lands that have restricted subsurface drainage be designated bottom land. This is because if more irrigation water is applied to land with restricted subsurface drainage, then more water would need to be drained and an artifical drainage system would be more expensive. Additionally, if artificial drainage is not installed in lands with restricted subsurface drainage, then the application of additional water will further raise the water table and will further reduce crop yields.

The following paragraphs describe the changes made between the 1985 map and the remand map for each township within the project.

Township 20 N, Range 24E, MDB&M:

This township is mostly bench land on the 1985 map, except for areas in sections 10, 11, 12, 13, 14, 15, and 24. Those bottom land areas are for the most part in the city of Fernley, under the highway, are not irrigated, or are small parts of fields. Therefore, the entire township is designated as bench land on the remand map in accordance with the broad and general requirement, since these areas are far to the west of the Walker line.

Township 20 N, Range 25E, MDB&M:

This township is mostly bench land on the 1985 map except for an area in section 18. That area includes a highway interchange, nonirrigated land, and a small irrigated area. This whole township is now designated as bench land on the remand map in accordance with the broad and general requirement.

Township 20 N, Range 26E, MDB&M:

This township is designated bench land on the 1985 map except in sections 26, 27, 34, and 35. Those bottom land areas are located under the town of Hazen, under the highway and the railroad tracks, and are not irrigated. Therefore, the entire township is designated as bench land on the remand map.

Township 20 N, Range 28E, MDB&M:

The 1985 map designates this township to be all bench land except for two small areas in sections 32 and 33. Those two areas are intermittent bodies of water and are not irrigated, therefore, the remand map designates this entire township as bench land.

Township 20 N, Range 29E, MDB&M:

This township is mostly bottom land on the 1985 map except for sand dune areas that are not irrigated. Therefore, this township is designated entirely bottom land on the remand map in accordance with the broad and general requirement.

Township 20 N, Ranges 30E and 301E, MDB&M:

These townships are designated entirely bottom land within the project boundary on the 1985 map and are designated entirely bottom land on the remand map.

Township 19 N, Range 26E, MDB&M:

This township is designated mostly bench land on the 1985 map except for areas along the Carson River and small marsh areas. Many of the bottom land areas, on the 1985 map, are irregular shapes mixed with bench land within fields. On the remand map those areas that are well drained are designated bench land so that fields have one designation. Areas in sections 24 and 25 are designated bottom land on the remand map as they have high available water holding capacity soils and are located near the lake behind the Carson Diversion Dam which causes restricted drainage. In section 25, field boundaries, rather than quarter-quarter section lines, are used to separate bench and bottom lands due to the irregular orientation of the fields.

Township 19 N, Range 27E, MDB&M:

This township is designated mostly bench lands on the 1985 map except for marsh areas in sections 1, 5, 10, 12, 13, and 18 and irregular bottom land areas along the Carson River. On the remand map the irregular areas and marsh areas are designated bench land so that individual fields have one designation. The only bottom land areas on the remand map, in this township, are in sections 19 and 30 where the soils have high available water holding capacities and have restricted drainage due to the proximity to the lake behind the Carson diversion dam.

Township 19 N, Range 28E, MDB&M:

This township is designated mostly bench land on the 1985 map in sections 4, 5, 6, 7, 8, 10, 15, 16, 17, 18, 19, and 20 and mostly bottom land in sections 13, 14, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, and 36. Other sections have a mixture of designations or are outside the district boundary. The aerial photography shows that many of the irregular bench land areas, in sections that contain mostly bottom land on the 1985 map, are nonirrigated dune areas and areas within the town of Fallon. Many of the irregular bottom land areas in sections that contain mostly bench land on the 1985 map, are nonirrigated marsh areas. Several new holes were logged in this township for the remand map development. The remand map contains bench land in sections 4, 5, 6, 7, 8, 9, 10, 16, 17, 18, 19, 20, 30, 31, and 32; and

bottom land in sections 13, 14, 15, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36. The boundary between bench and bottom lands are taken as quarter-quarter section lines so that individual fields would have one designation.

Township 19 N, Range 29E, MDB&M:

This township is mostly bottom land with small irregular areas of bench land on the 1985 map. Based on new auger holes, and due to the fact that many of the bench lands areas on the 1985 map are in the town of Fallon, are nonirrigated dune areas, or are irregular areas within fields, the entire township is designated bottom land on the remand map.

Township 19 N, Range 30E, MDB&M:

This township is designated mostly bottom land on the 1985 map with irregular areas of bench land scattered around. Based on new auger holes, and since most of the irregular areas are not irrigated, the remand map designates the entire township as bottom land.

Township 19 N, Range 31E, MDB&M:

This township is designated entirely bottom land on the 1985 map and is designated entirely bottom land on the remand map.

Township 18 N, Range 28E, MDB&M:

This township is designated mostly bottom land on the 1985 map except in sections 6, 7, 8, 15, 16, 21, and 22. Many of those bench land areas on the 1985 map are nonirrigated dune areas and are designated bottom land on the remand map. Based on new auger holes, and the requirement for each field to be either all bench or all bottom land, the remand map designates sections 5, 6, 7, 8, and 15 as bench land, and the remainder of the township as bottom land.

Township 18 N, Range 29E, MDB&M:

This township is designated mostly bottom land on the 1985 map except for sections 9, 10, 14, 15, and 16. Since those sections are where the Fallon Naval Air Station runway is, and new auger holes indicate a shallow water table, the entire township is designated bottom land on the remand map.

Township 18 N, Range 30E, MDB&M:

This township is designated entirely bottom land, except for a small nonirrigated area in section 18, on the 1985 map. This township is designated entirely bottom land on the remand map.

Township 17 N, Range 28E, MDB&M:

This township is designated mostly bottom land on the 1985 map except for areas in sections 2, 11, and 14. Based on new auger holes this township is designated entirely bottom land on the remand map.

Township 17 N, Range 29E, MDB&M:

This township is designated entirely bottom land on both the 1985 map and the remand map.

The remand map designates the starting point for Newlands Project unit water duties. Changes to the remand map, after court approval, are intended to be made by the Federal water master.

The attached computer listing shows bench and bottom land acres by landowner name and farm number. All of a farmer's adjoining ownerships are grouped together as a farm, and the farms are numbered in alphabetical order by owner name. The total water righted area on the listing is 73,840.25 acres of which 11,167.93 acres are designated bench land and 62,672.32 acres are designated bottom land.

Appendix M

In the United States District Court
for the District of Nevada

Civil D-185-BRT

The United States of America,
Plaintiff,

vs.

Alpine Land and Reservoir Co., et al.,
Defendants.

FINAL ORDER

This proceeding was initiated after a conference among all interested parties in a companion case (*Pyramind Lake Paiute Tribe of Indians v. Clark*, Docket No. 85-197 BRT) in which it was agreed that TCID acting on behalf of all Newlands Project water users would file a petition for declaratory relief to establish the identity of the bench lands and bottom lands in the Project. Both the Truckee River Final Decree and the Carson River Final Decree allotted a duty of water of 4.5 a.f.a. to bench lands and 3.5 a.f.a. to bottom lands in the Newlands Project. The petition was filed praying that the bench and bottom land division be based on "historical deliveries" of water to the project lands. The United States filed a Reply to the petition praying that it be dismissed. The Paiute Tribe filed an Answer to the petition praying that it be dismissed and that the Bureau of Reclamation's (BOR's) classification be modified to reduce water duties of lands which had not been beneficially using the duty of water allocated by the BOR.

The first trial on the correct classification of bench and bottom lands commenced on July 28, 1986 and continued through August 1, 1986. At the conclusion of the trial the Court ruled from the bench. A partially garbled transcript of the oral decision is item No. 17 in the file. The Findings of Fact and Conclusions of Law (item No. 21) filed September 11, 1986, correctly memorialize the Court's decision. On September 11, 1986, the Court also granted the BOR's and the Paiute Tribe's motion for reconsideration of the decision for the reasons stated in the Order for Reconsideration (item No. 19). The hearing on the motion for

reconsideration was held on January 9, 1987. Additional evidence was received. At the conclusion of the hearing counsel for the BOR proposed (with utmost good faith) that the BOR understood what the Court wanted with respect to the bench-bottom land dichotomy and that if the matter would be remanded to the BOR the Bureau would come up with a map which would be fully in accord with the Court's requirements. Counsel offered to submit a proposed remand order so that the Court could determine whether this proposed course would be efficacious. On January 26, 1987, the proposed order was submitted. This was adopted, with modifications, in the order entered on January 28, 1987 (item No. 26). The six months granted for this new submission was a time limitation suggested by the attorney for the BOR after consultation with his expert and no request for an extension of time was ever presented to the Court. On July 24, 1987, the BOR submitted and filed a revised bench and bottom land map. The TCID promptly filed objections and requested a hearing. The Paiute Tribe filed minor objections. Ten water users filed a petition to intervene with accompanying objections. A hearing was held on BOR's remand map and the objections thereto commencing on November 23, 1987 and concluding on November 25, 1987. Additional oral and documentary evidence was received. Most of the expert witnesses who testified had participated in the two earlier hearings. The noteworthy impacts of the final hearing were that BOR had added approximately 5,000 acres of farms reduced from 4.5 a.f.a. water duty to 3.5 a.f.a. water duty as compared with earlier proposals and WRD (this is the designation of the team of experts who support the objections and proposals of TCID and farmer intervenors) had added 8,647 acres of farms increased from 3.5 a.f.a. water duty to 4.5 a.f.a. water duty as compared with their earlier proposals.

GENESIS OF THE DISPUTE

Pyramid Lake is a large body of water within the boundaries of the Pyramid Lake Indian Reservation in Washoe County, Nevada. Its water source is the Truckee River. Its fisheries are endangered (cui-ui) and threatened (Lahontan cutthroat trout) because of diminished flows of water from the Truckee River. The

Newlands Reclamation Project is a federal reclamation project in Churchill County, Nevada containing approximately 72,000 acres of water righted lands. The construction of the project works were substantially completed in 1915. The sources of water for irrigation of the project farms are the natural flow of the Carson River after satisfaction of the water requirements of farmers above Lahontan Reservoir and the diversions from the Truckee River into the Lahontan Reservoir via the Truckee Canal. The Lahontan Reservoir was artificially created by damming the Carson River. The contribution of the Truckee River to the water requirements of the Newlands Project is defined in the Truckee River Final Decree (which was preceded by a 1926 temporary restraining order) to permit a diversion of 1,500 c.f.s. at Derby Dam through the Truckee Canal "provided that the amount of this water allowed or used for irrigation shall not exceed after transportation loss and when applied to the land, 3.5 acre feet per acre for bottom lands, nor 4.5 acre feet per acre for the bench lands under the Newlands Project." The Decree also provides:

> Except as herein specially provided no diversion of water into any ditch or canal, in this decree mentioned shall be permitted except in such amount as shall be actually, reasonably necessary for the economical and beneficial use for which the right of diversion is determined and established by this decree. The amounts of water hereinbefore allowed are declared to be sufficient for the uses herein mentioned, and any and all use of water in excess of such decreed amounts is declared to be wasteful, and all wasteful or excessive use of water is hereby prohibited.
>
> In any case where water is obtained from two or more sources, the aggregate amount of the combined waters from such sources which may be used, shall not exceed the amount required for such use as herein determined.

It is, therefore, obvious that the primary source of water for the Newlands Project is the Carson River and that the Truckee River is a secondary or supplementary source. Over the years little attention has been paid to these priorities. Table 6 on pages 25 and 26 of Exhibit 34 schedule the contributions of the Truckee Canal and the Carson River to the water supply for fifty-nine

years. In many of those years Truckee River water was diverted which was not needed for beneficial use and which should have gone into Pyramid Lake. Glaring examples are 1938, 1950, 1956, 1963, 1965 and 1969. (The Court, of course, recognizes that the measurement of flow at Fort Churchill does not determine the acre feet of Carson River water available for delivery to the farms throughout the irrigation season).

The Pyramid Lake Paiute Tribe is vitally interested in the instant bench-bottom land controversy because the aggregate acreage assigned a bench land water duty rather than a bottom land water duty may make a difference of thousands of acre feet of water available to Pyramid Lake. This is a significant interest.

THE WALKER LINE

The third trial recently concluded in November 1987, marked the first time any analytical attention had been paid to the so-called Walker line or 3,980 foot contour line. Since 1927, this line had been referred to as the rough dividing line between bench lands and bottom lands, and until the latest hearing the Court had conceived it to be a designation with geological significance, such as the crown line of a bluff. Not so. The overwhelming preponderance of the evidence supports a finding that the Walker line is meaningless vis-a-vis the bench-bottom land dichotomy. Farms with the same soils, water holding capacities and relevant water tables are found on both sides of this imaginary line.

BENCH VERSUS BOTTOM LANDS

The testimony uniformly supports a finding that conditions in the Newlands Project are quite dissimilar from other areas or reclamation project where a bench and bottom land water duty distinction has been made. In such other areas the words "bench" and "bottom" are descriptive of the physiographic geology of the area.

In the Newlands Project (excepting the Truckee Division) there is no topographical meaning to the distinction. It is related solely to the water requirements of the various soils to produce alfalfa. WRD Exhibit 34 at pages 59-61 accurately describes the

conditions in the alluvial fan created by the meanderings of the Carson River over the centuries. The fine, less pervious soils with high water holding capacities are interlaced with stringers or channels of coarse, sandy, well drained materials. These channels affect the drainage and water table levels of the adjoining soils which might otherwise be classified as bottom lands. There is no rebuttal of the WRD description of the Newlands Project soil characteristics. It is corroborated by Exhibit 125 and its accuracy was recognized and demonstrated by the BOR in its initial bench-bottom land maps which arrived at weighted averages for parcels with mixed characteristics and visibly demonstrated the soil mixtures. The testimony of Mr. David Matley was to the effect that the lands he farms have these characteristics. The evidence, nevertheless, supports a finding that a classification of bench lands and bottom lands is viable and justified for the Newlands Project with a water duty of one acre foot per acre more for the areas properly classified as bench lands.

THE BOR AND WRD REMAND MAPS ARE UNACCEPTABLE AND INDEFENSIBLE

The BOR remand map and accompanying explanation makes no reasonable effort to comply with the Remand Order filed January 28, 1987. Three glaring deficiencies are sufficient to disqualify the BOR's remand map. First, the BOR submission (report and map) filed July 24, 1987, treats the Walker Line as an absolute. This is a misinterpretation of the remand order and it is an unsupportable interpretation in light of the Court's Order for Reconsideration filed September 11, 1986 (item No. 19):

> The Tribe urges the Court to revise that portion of the Court's ruling . . . by recognizing the validity of the 1927 Walker line along the 3980 contour elevation for bench-bottom land classification purposes. This is ridiculous. In its oral ruling, the court alluded to 'the so-called Walker line' merely as illustrating the rough, general nature of the classification of bench and bottom lands, a concept which had been thereafter effective for fifty years. And the court expressed the intention that the results of that fifty years of

experience should be the starting point for any reclassification of lands irrigated in the Newlands Project.

In the second place, the BOR remand map relies heavily on depth of water table with slight weight accorded other factors affecting the proper classification. The only excuse given for this distortion is lack of time, but the BOR imposed its own time limitations. The testimony of Mr. David Keith Todd, a highly qualified consulting engineer, concludes as follows: "The proposed USBR water criteria do not provide a valid basis for land classification because of (a) the variability of groundwater, (b) the ongoing cost of implementing the methodology, and (c) a failure to meet the stability and permanence requirement of the court." (Ex. 125). These conclusions are strongly supported by the evidence and the Court finds that they are correct.

Mr. Todd testified that the ground water data relied upon by the BOR was highly unreliable because the measurements varied so much and did not take into account the important factor of duration of a high water table. This was corroborated by the testimony of WRD personnel.

The other new face among the experts was Mr. Keith A. Campbell, a drainage engineer with the Bureau of Reclamation Drasinage and Research Center in Denver, Colorado. Mr. Campbell has had many years of experience with high water table and drainage problems in reclamation projects throughout the west. He testified that the normal experience with irrigating reclaimed desert lands was creation of a drainage problem. There was nothing unusual about the construction of four hundred miles of drains in the Newlands Project, and from this we infer that it is not appropriate to conclude from the existence of such drains that too much water had been applied for irrigation of the farms.

In this case the BOR expert, Mr. Gordon Lyford, worked from a water table standard of six feet or less for 150 days or more during the irrigation season. Mr. Campbell testified that four feet was the critical depth of water table for alfalfa applied by the Bureau throughout the reclamation projects. The WRD Report (Ex. 34) corroborates a finding that four feet is the critical water table depth. (See pages 41, 44, 79). This Court sees no reason

why a six foot standard should be applied to the Newlands Project. Mr. Campbell also testified that if, over a large area, the water table was consistently above four feet, the options of the farmers in that area were: (1) to accept that the ability to manage for optimum production of alfalfa would be limited; (2) to change to crops that don't have a deep root zone; (3) to provide drainage to correct the problem. Mr. Campbell did not suggest that an appropriate option was to reduce the duty of water available for irrigation. Mr. Campbell also emphasized that for a water table above four feet to be an impairment to the growth of alfalfa, the water table must continue at that level for "some length of time." It was primarily this requirement of duration which was missing from the water table data relied upon by Mr. Lyford.

Finally, the BOR remand map is deficient for arbitrarily classifying the water-righted not irrigated portions of the Fallon Indian Reservation (Ex. 119) as bottom lands. The only reason given in support of this was that it was a "judgment call" predicated on the belief that if irrigation water should be applied to the non-irrigated lands the water table would be raised above six feet.

The WRD remand map is similarly deficient for arbitrarily increasing the acreage with a 4.5 a.f.a. duty of water by some 6,000 acres. No justification was given for this and Mr. Mahanna did mutter within the Court's hearing that it "wasn't very scientific."

The fact is that the experts who testified at all three hearings suffer from diminished credibility as a consequence of the third hearing. Their testimony was clearly partisan and prompted by overreaching to produce in the case of plaintiff an allocation of the greatest possible water requirement to the Newlands Project, and in the case of the Bureau and the Tribe the least.

AGREEMENT BETWEEN BOR AND WRD

In the post-trial submission of additional exhibits requested by the Court, the TCID described 2,358.80 acres of project lands which WRD found to be properly classified as bottom lands rather than bench lands (as shown on the TCID map (Ex. 6)). Although according to the Court's perception there is not com-

plete agreement between the BOR and the WRD as to these lands, there is agreement as to most of them. Thus, according to every test known to man these approximately 2,000 acres should be classified as bottom lands with a water duty of 3.5 a.f.a. Accordingly, as to the acreages of these lands as to which the BOR and WRD are in agreement, the water duty shall be 3.5 a.f.a. on the initial map.

HISTORICAL PRACTICES

Reconsideration of the Court's original decision was granted because of the conclusive showing that over the early years of the Newlands Project there never had been an effort to distinguish between bench and bottom lands on any rational basis. Water usage was almost the only criterion.

The action brought by the Pyramid Lake Tribe of Paiute Indians against the Secretary of Interior constituted a very sharp needle which produced responses not only from the Secretary but from TCID, although the latter was not a party to the action. The testimony with respect to how the TCID Board of Directors processed the list of requests for increased water allocations after 1970 (Ex. 38) demonstrates an awakened perception of their responsibilities. In 1977, resolutions were passed reducing all deliveries of water to bench lands to 4.5 a.f.a. and instituting charges against the user based on the number of acre feet of water delivered rather than the number of acres irrigated (the previous system). So, since 1977, we have ten years of experience of water deliveries based on the Carson and Truckee River Decrees and the practical needs of the farmers. This experience is illustrated by Ex. 6, the computerized map developed by BOR. It is the only reliable starting point available to the Court.

THE BOR REMAND MAP

Part of the assignment in the Remand Order was to disregard the TCID parcelization of properties (which has never been explained) and to allocate the water deliveries and land classifications to practical farming units. The Bureau did redesignate the farming units in accordance with the Court's suggestion and

without objections from any parties to this action. We do observe that in the TCID's submission of post-trial exhibits there are some presumably water-righted acres listed to which no new farm unit designation has been given.

THE EFFECT OF THIS DECREE

This declaratory judgment proceeding was initiated to establish a starting point for identification of bench lands entitled to a water duty of 4.5 a.f.a. and bottom lands entitled to a water duty of 3.5 a.f.a. This was essential for a computation of the total demand of the Newlands Project on the two sources of water, the Carson River and the Truckee River, and also to permit the Secretary to promulgate appropriate criteria for the management of the Project and the delivery of water to the water-righted irrigated lands.

At the time the Final Decree in the *Alpine* case was entered, this Court intended that (1) TCID's classification of the bench and bottom lands in the Newlands Project be the starting point in determining the appropriate water deliveries to each individual farm, (2) that any person or entity who felt that TCID's classification of bench and bottom lands and/or TCID's water deliveries to any individual farm were improper should petition the Water Master and request a change in that classification and/or those water deliveries, (3) notice of that petition would be given to the individual farmer and to TCID and the Bureau of Reclamation, (4) the Water Master in acting upon that petition would consider all relevant factors such as water tables, soils and their water holding capacities, farming practices, and the types of crops being grown and determine if that farmer's overall use of water on that particular farm was wasteful resulted in a non-beneficial use of water and if so, change the TCID classification and/or adjust the water deliveries accordingly, and (5) any person or entity feeling aggrieved by the action or order of the Water Master could appeal to the Court who would then review that action or order of the Water Master and make such further order as the circumstances warranted. This Court finds that this is the procedure that shall be followed in any bench and bottom land reclassificaiton of any

individual farm on the Newlands Project and/or in determining the amount of water that is to be delivered to that individual farm.

Each petition for change of classification contemplated by the foregoing paragraph should be limited to a farm unit or units in one ownership. The aggregation of a number of farm units in several ownerships in such a petition is not contemplated or permitted under the Alpine Decree. The Water Master should dismiss a petition filed in contravention of this directive. While the Pyramid Lake Paiute Tribe of Indians has an obvious interest in this action for declaratory relief involving the entitlement to thousands of acre feet of water divertible from the Truckee River and affecting flows to Pyramid Lake, the Paiute Tribe, despite inadvertent or thoughtless statements in earlier orders, will have no standing to initiate or oppose any petition to the Water Master to change the classification of lands in the Project as bench or bottom lands. A change of classification for a single farm unit will have an insignificant and legally non-existent effect on the rights of the Paiute Tribe. The interested parties in such a petition for change of classification are the farm unit owners and the Bureau of Reclamation. TCID is interested as a stakeholder. It, and its Board of Directors, do have authority to investigate, consider and make recommendations relative to any such request prior to the initiation of formal proceedings before the Water Master.

In view of the foregoing, this decree is not a final determination of the water duty entitlement of any specific farm unit.

MOTION OF FALLON PAIUTE SHOSHONE TRIBES

The Fallon Paiute Shoshone Tribes have filed a motion for leave to file an amicus curiae memorandum. That motion will be granted and the Court has considered the representations and arguments of amicus in formulating this decision.

MOTION OF CHURCHILL COUNTY

On November 23, 1987, the day the final hearing in this proceeding commenced, Churchill County filed a Motion to Intervene. The motion should be denied. It is not timely. *United*

States v. Alpine Land and Reservoir Co., 431 F.2d 763 (9th Cir. 1970), *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir. 1978). In determining timeliness the Court should consider the stage of the proceedings, the prejudice to other parties, and the reason and the length of the delay. (*Alaniz, supra* at 659). Hereinabove we have related the history of these proceedings. This motion to intervene comes after two evidentiary hearings and on the first day of the third evidentiary hearing. No excuse for not requesting earlier participation is given. The assertion that Churchill County did not become aware of the potential adverse effects upon its interests until November 11, 1987, is incredible. This bench-bottom land controversy has been highly publicized and is a matter of common discussion in the county. The requirements of the BOR for an early determination of the problem because of its effect on the OCAP, show the severe prejudice that may result from a delay caused by this later intervention. The Court observes that the statement on page 4 of Churchill County's brief: "Churchill County's understanding is that pursuant to a Remand Order entered by this Court on January 30, 1987, the Secretary of Interior has offered to the Court a plan for reclassification of bench to bottom land in which all lands with an elevation less than 3980 feet will be classified as bottom land" is a mischaracterization of the BOR proposal. The interests of Churchill County are quite adequately represented by the TCID and the intervening farmers who understand the case much better than applicant for intervention.

In consideration of the premises,

IT HEREBY IS ORDERED, ADJUDGED DECREED AND DECLARED:

1. The motion of Churchill County to intervene is denied.

2. The motion of the Fallon Paiute Shoshone Tribes to file an amicus curiae brief is granted.

3. The TCID shall adopt the designation of farm units prescribed by the BOR in its remand map and report and may supplement it where appropriate for completeness and accuracy and to reflect changed conditions and ownership.

4. The TCID computerized map (Ex. 6) shall be the starting point for the identification of bench and bottom lands in the Newlands Project except that with respect to any of the farm units identified in the additional exhibits filed December 18, 1987 in the schedule entitled "1987 WRD Bench & Bottom Land Decreases from TCID Bench to WRD Bottom" as to which the BOR has also assigned a bottom land classification, such farm units shall be assigned a bottom land classification on the initial maps.

5. Pursuant to the provisions of the final decree in *U.S. v. Alpine Land and Reservoir Co.*, Docket No. D-183, the foregoing order may be modified or changed with respect to any specific farm unit or units in single ownership by petition to the federal Water Master.

6. The following OCAP are prescribed to govern proceedings before the federal Water Master:

(a) Each petition shall be limited to a specific farm unit or units in one ownership.

(b) The opposing parties shall be the Bureau of Reclamation and the farm owner or owners. The Pyramid Lake Paiute Tribe shall not have standing to initiate or oppose any such petition.

(c) The Water Master may receive and consider any recommendations of the TCID and its Board of Directors.

(d) The critical water table standard to be used and applied with respect to alfalfa crops shall be four feet or less enduring for a considerable length of time. If the farmer has adopted a practice of double cropping it shall be recognized that more water is required under such circumstances than for single cropping of crops other than alfalfa.

(e) A written record shall be made of any such proceedings if court review is requested.

7. The Clerk of this Court shall keep and maintain the files and exhibits in this proceeding in the local office for the use and reference of interested parties, the Water Master and the Courts.

Subject to the further order of the Court, the exhibits shall not be returned to the parties and the files shall not be transmitted to the federal record center.

DATED February 11, 1987.

BRUCE R. THOMPSON

United States District Judge

Appendix N

UNITED STATES of America,
Plaintiff-Appellant,

v.

ALPINE LAND AND RESERVOIR CO.,
Defendant,

and

Truckee-Carson Irrigation District,
Defendant-Appellee.

UNITED STATES of America, Plaintiff,

v.

ALPINE LAND AND RESERVOIR CO.,
Defendant,

and

TRUCKEE-CARSON IRRIGATION DISTRICT,
Defendant-Appellee,

v.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-Appellant.

Nos. 88-2539, 88-2542.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 9, 1989.

Decided Oct. 4, 1989.

Appeal from the United States District Court for the District of Nevada.

Before SCHROEDER and CANBY, Circuit Judges, and LEW,* District Judge.

SCHROEDER, Circuit Judge:

Introduction

This appeal is yet another phase of the epic litigation over rights to the waters of the Carson and Truckee Rivers. Here, the United States together with the Pyramid Lake Paiute Tribe of Indians (the Tribe), the downstream user of the Truckee River, is pitted against the Truckee-Carson Irrigation District (TCID), which represents the owners of land within the Newlands Reclamation Project (the Project), the upstream users of the Carson and Truckee Rivers.

The Project has two divisions, the Truckee and the Carson. To supply the irrigators of the Truckee Division with water, some Truckee River water is diverted, through the Derby Diversion Dam and the Truckee Canal, from its natural flow into Pyramid Lake. The diverted Truckee water not used in the Truckee Division is then impounded at the Lahontan Reservoir, and distributed to the Carson Division. The Carson River runs eastward from the Sierra Nevada mountain range in California to the Lahontan Reservoir in Nevada, where it joins with water from the Truckee River Canal to irrigate the Carson Division. Thus, the Truckee River waters irrigate both the Truckee and Carson divisions, while the Carson River waters irrigate only the Carson Division. The United States controls the Project's irrigation equipment, and TCID manages the Project pursuant to a contract with the United States. *Truckee-Carson Irr. Dist. v. Secretary of Dept. of Interior*, 742 F.2d 527, 530 (9th Cir. 1984), *cert. denied*, 472 U.S. 1007, 105 S.Ct. 2701, 86 L.Ed.2d 717 (1985).

Because any water diverted from the Truckee cannot be recovered for use at the Tribe's fishery at Pyramid Lake, the Tribe is vitally interested in limiting the diversion of Truckee River water. On the other hand, the landowners are interested in maximizing

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* Honorable Ronald S.W. Lew, United States District Judge for the Central District of California, sitting by designation.

the amount of water diverted so that their farms can be sufficiently irrigated.

The question here is whether the United States government has the authority to set the basic guidelines for the classification of Project lands as their "bench" or "bottom." A great deal rides on these classifications for under the controlling court decrees, governing allocation of rights in the Truckee and Carson waters respectively, bench lands are entitled to a maximum water duty of 4.5 acre feet per acre/year (afa) and bottom lands receive a maximum of only 3.5 afa.[1] Rights to the Carson River waters are governed by the *Alpine Decree, United States v. Alpine Land & Reservoir Co.*, 508 F.Supp. 877 (D.Nev. 1980), *aff'd as modified*, 697 F.2d 851, 853 (9th Cir.), *cert denied*, 464 U.S. 863, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983). Rights to the Truckee River waters are governed by the *Orr Ditch Decree. United States v. Adams (Orr Ditch)*, Equity Docket No. A8 (D.Nev. Sept. 8, 1944). Much of the history of these proceedings, which have continued since 1913, is related in *Nevada v. United States*, 463 U.S. 110, 113-18, 103 S.Ct. 2906, 2910-12, 77 L.Ed.2d 509 (1988).

The instant dispute arises in the context of the continuing proceedings in the *Alpine* litigation. In the *Alpine Decree*, the court retained continuing jurisdiction for water allocation and appointed a Watermaster. The decree directed the Watermaster to use historic practices, customs, agreements and decrees in the administration of the river. *Alpine Land*, 508 F.Supp. at 891, *aff'd as modified*, 697 F.2d at 851.

Unfortunately, neither the *Orr Ditch Decree* nor the *Alpine Decree* classified or described any method for classifying Project lands as either bench or bottom. The decrees themselves provide no criterion other than the use of historic practices to determine the appropriate water duty beneficial to the lands. *See Alpine Land*, 503 F.Supp. at 889-90. That omission gives rise to this dispute. The principal issue on appeal is whether the Department

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[1]Water duty is the "amount of water an appropriator is entitled to use, including a margin for conveyance loss." *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir.), *cert. denied*, 464 U.S. 863, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983).

of Interior (DOI) or the district court bears the primary responsibility for formulating these initial classifications, subject to later resolution by the Watermaster of disputed classifications.

The Reclamation Act of 1902 (Act), 43 U.S.C. § 371 *et seq.* (1982), was intended to be a comprehensive legislative scheme which charged the Secretary of Interior (Secretary) to examine arid and semi-arid lands and survey them for development. *Henkel v. United States,* 237 U.S. 43, 49, 35 S.Ct. 536, 539, 59 L.Ed. 831 (1915); *see Nevada,* 463 U.S. at 128, 103 S.Ct. at 2917. To meet this responsibility the Secretary is charged with supervising the business related to the Bureau of Reclamation (BOR), 43 U.S.C. § 1457(6) (1982), which in turn is responsible for administering the reclamation of arid lands, 43 U.S.C. § 373a (1982). Thus, DOI has responsibility for overseeing the management of the Newlands Reclamation Project.

As part of DOI's responsibility for overseeing the management of the Project, the Secretary promulgated regulations in 1967 to initiate controls lacking in the past to limit the diversion of waters by TCID and thus make more water available for delivery to Pyramid Lake. 43 C.F.R. § 418.1(b) (1988). The regulations provide that they shall be in compliance with all the terms and conditions of both the *Orr Ditch* and *Alpine* decrees. 43 C.F.R. § 418.4(a) (1988).

In 1967, DOI began issuing operating criteria and procedures (OCAP) to govern the diversion of Truckee River flows to Lahontan Reservoir for use in the Project. In 1986, DOI proposed and eventually adopted OCAP requiring TCID to deliver water to the Project according to the classification of bench and bottom lands within the Project as indicated on maps prepared by the BOR. The OCAP also provided that objections to BOR's classifications of bench and bottom lands would be resolved by the Watermaster pursuant to the *Orr Ditch* and *Alpine* decrees. TCID's efforts in this proceeding have been directed toward overturning those regulations and substituting its own bench/bottom designations as the starting point for the Watermaster's determinations.

After several hearings and repeated comparisons of the bench/bottom classifications proposed by DOI and TCID the district court eventually ruled in favor of TCID, in what amounted to a *de novo* review of DOI's bench/bottom classifications. The government appeals, contending that its regulations were promulgated in the exercise of authority properly delegated to the agency, and should have been reviewed under deferential standards appropriate to such regulations.

The district court also ruled that the Tribe lacked standing to participate in any of the Watermaster's future determinations regarding individual farm lands. The Tribe appeals that decision.

Proceedings Below

Challenges to DOI's OCAP began in 1972 in the District of Columbia. *Pyramid Lake Paiute Tribe of Indians v. Morton,* 354 F.Supp. 252 (D.D.C. 1978). The court reserved jurisdiction to review annual OCAP. *Id.* at 261, 262. That case was transferred in 1985 to the district court in Nevada where it continues as *Pyramid Lake Paiute Tribe of Indians v. Hodel,* No. CV-85-0197-BRT. The district court in Nevada retains continuing jurisdiction to review the annual revisions of the OCAP. *See Pyramid Lake Paiute Tribe of Indians v. Hodel,* 882 F.2d 364 (9th Cir. 1989).

The interim OCAP giving rise to this dispute were promulgated in 1986. They provided that the BOR's Bench and Bottom Land Classification Maps, as they might be periodically updated, would form the basis for determining the maximum water to be delivered to each parcel of Project land. The OCAP further provided that TCID could institute proceedings in the *Alpine* and *Orr Ditch* cases to obtain resolution of any dispute it had with the maps.

The effect of DOI's initial land classification was to designate as "bottom" 9,066 acres of land previously treated as "bench" and to designate 2,699 acres as "bench" previously treated as "bot-

tom." These lands are primarily in the Carson Division.[2] Thus, pursuant to DOI's initial classifications, certain farms would be receiving substantially less water than they currently receive.[3]

Not surprisingly, in March of 1986, TCID filed a motion in *Pyramid Lake Paiute Tribe of Indians v. Hodel* to vacate the provision of the OCAP requiring use of BOR's map to classify bench/bottom lands. On April 25, 1986, the district court issued an order directing TCID to file a petition in a separate action to resolve the dispute over the proper methodology to be used to determine which Project lands are bench and which are bottom.

Accordingly, on May 23, 1986, TCID instituted this proceeding by filing a petition for declaratory relief seeking to determine the proper criteria to be used to classify Project lands as either bench or bottom. Specifically, TCID sought a declaration that (1) DOI's classification of land as bench/bottom was arbitrary, unreasonable and not enforceable, and (2) water deliveries be based on historical practices.

On August 1, 1986, after hearing testimony and closing arguments from DOI, TCID and the Tribe, the district court ruled

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[2]Because diversions from the Carson River do not directly affect Pyramid Lake, the Tribe has sought and obtained judicial rulings that Carson River flows should be utilized whenever possible, before Truckee River flows, to supply the Project with its necessary water. *See, e.g., Pyramid Lake Paiute Tribe of Indians v. Morton,* 354 F.Supp. 252 (D.D.C. 1973). Because Truckee River flows are utilized to irrigate lands in both the Truckee and the Carson Divisions, any decrease in water entitlements in the Carson Division would correspondingly decrease Truckee waters used in the Carson Division, and thereby increase the flow into Pyramid Lake.

[3]The basis for current water deliveries was heavily contested below, with the district court changing its findings on a number of occasions. Apparently, the current water deliveries are based on actual water allocations made between 1925 and 1932, with post-1977 adjustments to reflect TCID's compliance with the *Orr Ditch* and *Alpine* decrees. The current water deliveries, which TCID proposed as the starting point of bench/bottom designations, were represented in the district court as TCID's Exhibit 6 map.

that the OCAP, upon which DOI's classification of bench/bottom lands was based, were "arbitrary and unreasonable and would not be enforced." In addition, the court held it was the intent of the *Alpine Decree* that once the classifications of bench/bottom lands were made that they be maintained with "considerable permanence and stability." The court held that TCID's map designating bench and bottom lands, rather than BOR's map, was the appropriate starting point to determine any classification of Project lands. The court also confirmed that any challenge to the classification of the lands must proceed before the Watermaster, as provided in the *Alpine Decree*.

On August 8, 1986, the Tribe filed a motion for reconsideration of the court's oral ruling. On September 15, 1986, this motion was granted to explore whether the TCID map correctly indentified the historical classification of bench and botton lands and, if not, what adjustments had to be made to reflect the historical status of those lands.

On January 28, 1987, the court stated that both the TCID map and the BOR map were deficient in a number of respects. The court remanded the matter to DOI to prepare a revised map, and gave instructions regarding how the map should be revised. The court instructed DOI to develop a classification system that would call for the allocation of water based on soil and water table criteria, as well as provide for permanence and stability.

On July 24, 1987, DOI submitted a revised map, known as the DOI remand map. TCID also submitted a revised map. Again, DOI and TCID presented conflicting maps.[4] On September 10, 1987, several family farmers, including David J. Matley, were allowed to intervene in the proceedings. A three-day trial commenced on November 23, 1987.

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[4]The primary differences are summarized as follows:

	Number of Acres Designated	
Type of Designation	*DOI Remand Map*	*TCID Remand Map*
"Bench" to "Bottom"	11,000	2,000
"Bottom" to "Bench"	400	8,000

On February 12, 1988, the district court entered its final order. After giving a synopsis of the litigation history, the court addressed the problem of classifying Project lands as either bench or bottom. The court found that DOI's remand map was deficient and also that the experts who testified on behalf of TCID and DOI at the remand heraing were unreliable. The court concluded that from 1977 to the present, water allocation to Project farmers had been based upon the practical needs of the farmers and that this experience, rather than DOI's classification scheme based on soil characteristics, was the only reliable starting point for classifying Project lands. The court did not discuss the apparent inconsistencies between this conclusion and its 1987 order requiring the use of soil criteria. It also did not address the deficiencies in TCID's original map which it had noted in January of 1987, before remanding to DOI. The court held that DOI's map would not be used and that TCID's original map would be the appropriate starting point for classifying Project lands as bench or bottom.[5]

In addition, the court held that, despite inadvertent statements in earlier orders, the Tribe would not have standing in any future dispute submitted to the Watermaster because "[a] change of classification for a single farm unit will have an insignificant and legally non-existent effect on the rights of the Paiute Tribe." The United States and the Tribe timely appeal.

Are Initial Bench/Bottom Classifications Within the Rulemaking Authority of DOI?

The central issue in this case is whether DOI has rulemaking authority to develop a methodology to distinguish between bench and bottom lands within the Project and to apply those criteria to designate Project lands as bench or bottom, subject to the final determination of the Watermaster in the event of a dispute over a specific farming unit. The district court did not explain the basis for its essentially *de novo* review embodied in its final order.

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[5]The district court also designated as "bottom" 2,000 acres of land previously treated as "bench" based on the post-trial briefs of all the parties, who agreed to the designation of those lands.

TCID originally filed its petition seeking review of agency action under the deferential standards of the Administrative Procedure Act. 5 U.S.C. §706(2)(A) (1982). But it now argues that the Act's broad delegation of authority to the government to regulate reclamation matters pursuant to section 10, 43 U.S.C. § 373 (1982), does not extend to any matters related to bench/bottom classification. TCID bases this argument on section 8 of the Act, 43 U.S.C. § 383 (1982), which provides that the maximum amount of water an appropriator is entitled to use is governed by state law. We disagree with TCID's present position.

Section 10 of the Act of 1902, 43 U.S.C. § 373, expressly grants broad rulemaking authority to DOI in connection with reclamation projects. Section 10 states:

> The Secretary of the Interior is hereby authorized to perfom any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

43 U.S.C. § 373.

Section 8 of the Act, 43 U.S.C. § 383, incorporates the concept of "federalism." The federalism provision provides that, notwithstanding any other provisions of the Act, state law governs the acquisition, distribution, and use of reclamation project water, and vested rights acquired thereunder, unless directly inconsistent with congressional directives. 43 U.S.C. § 383; *see California v. United States,* 438 U.S. 645, 677-78, 98 C.St. 2985, 3002, 57 L.Ed.2d 1018 (1987). 43 U.S.C. § 383 states:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

State law regarding the acquisition and distribution of reclamation water applies if it is not inconsistent with congressional directives. *See California,* 438 U.S. at 688-89 n. 21, 672 n. 25, 674-75, 98 S.Ct. at 2997-98 n. 21, 2999 n. 25, 3000-01. Before *California,* it was believed that only acquisition of water rights (appropriation and condemnation) were subject to state law. *Id.* at 668-69 n. 21, 98 S.Ct. at 2997-98 n. 21. In *California,* however, distribution of water was also held to be subject to state law. *Id.* at 672 n. 25, 674-75, 98 S.Ct. at 2999 n. 25, 3000-01. Conversely, in the absence of congressional directives, DOI can regulate distribution, acquisition, and vested water rights if its regulations are not inconsistent with state law. *Cf. id.* at 672-78, 98 S.CT. at 2999-3003.

Section 8 also expressly bases acquisition of water rights upon the concept of "beneficial use." It states that the "right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372. We have recognized that this constitutes a congressional directive mandating a beneficial use inquiry in place of any contrary dictate of state law. *United States v. Alpine Land & Reservoir Co.,* 697 F.2d 851, 855 (9th Cir.), *cert. denied,* 464 U.S. 863, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983).

TCID contends that section 8 somehow prevents the Secretary from promulgating regulations setting initial bench/bottom classifications. That contention finds no support in the language of the statute. Rather, section 8 sets forth standards that DOI is to follow when its activities pursuant to section 10 affect the acquisition of water rights. 43 U.S.C. § 383 ("the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with [state] laws").

Nor does our decision in *Alpine Land* stand for the proposition that DOI may not promulgate regulations of this nature. *Alpine Land* did not even involve DOI rulemaking. In that case, we upheld the aspect of the *Alpine Decree* which established the basic maximum 4.5 and 3.5 afa water duties for bench and bottom lands. *Alpine Land,* 697 F.2d at 857. We held that beneficial use is the measure of a water right, as mandated by section 8. *Id.* at

853. We refused to give any deference to contractual designations, recognizing instead the dynamic concept of beneficial use which varies according to changing conditions. *Id.* at 855. We did not purport to limit the scope of DOI's rulemaking authority.

In this case, we must follow the language of the Act as we previously interpreted it. We hold that under section 10 of the Act, the DOI is authorized to promulgate regulations establishing initial bench/bottom classifications, provided that the state law beneficial use standards mandated by section 8 are followed. We express no opinion as to whether these particular initial classifications either conform to or violate state law standards. We hold only that, in undertaking to establish an initial bench/bottom classification scheme, the DOI was acting within the scope of its regulatory authority under section 10.

This court has previously determined that OCAP are regulations of DOI and are reviewed under the arbitrary and capricious standard pursuant to 5 U.S.C. § 706(2)(A). *Truckee-Carson Irr. Dist. v. Secretary of Dept. of Interior,* 742 F.2d 527, 531-32 (9th Cir.1984), *cert. denied,* 472 U.S. 1007, 105 S.Ct. 2701, 86 L.Ed.2d 717 (1985). Here, however, the district court engaged in *de novo* review, with no deference to DOI.[6] TCID has failed to provide any satisfactory reason, and we have found none, why DOI's action in this case is not entitled to the deference afforded by the arbitrary and capricious standard of review.

Since the district court did not review the agency action under the appropriate standard, we remand for such review. *See Pullman-Standard v. Swint,* 456 U.S. 273, 292, 102 S.Ct. 1781, 1792, 72 L.Ed.2d 66 (1982) ("where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue") (*citing Kelley v. Southern Pacific Co.,* 419 U.S. 318, 331-32, 95 S.Ct. 472, 480, 42 L.Ed.2d 498 (1974)). Accordingly, we decline the government's suggestion that we review DOI's classification

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[6]Although the district court did not explicitly state what standard of review governed its decision, the parties do not dispute, and the record indicates, that the court ultimately engaged in *de novo* review, notwithstanding its occasional use of the term "arbitrary" in its final order.

system in the first instance and hold that it was not arbitrary and capricious.

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n. of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1988). Courts reviewing whether an agency action was arbitrary and capricious are limited to deciding whether there has been a clear error of judgment and whether the agency action was based upon consideration of the relevant factors. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). Deference to an agency's technical expertise and experience is particularly warranted with respect to questions involving engineering and scientific matters. *Cf. Lara v. Secretary of Interior*, 820 F.2d 1535, 1542 (9th Cir.1987) (deferring to agency's expertise in determining what constitutes a mineral discovery).

If the district court eventually overturns this DOI action, under the appropriate standards, the matter should once again be remanded to DOI. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598, 1607, 84 L.Ed.2d 643 (1985) (any deficiency found by the reviewing court should be corrected by the agency on remand because a reviewing court is not generally empowered to conduct a *de novo* review).

The Tribe's Standing

The district court's final order held that the Tribe would not have standing in any future dispute over land classification submitted to the Watermaster because "[a] change of classification for a single farm unit will have an insignificant and legally nonexistent effect on the rights of the Paiute Tribe." The United States and the Tribe contend that the district court erred by prospectively denying standing to the Tribe. We agree.

Generally, persons have standing to sue if the challenged action has caused them "injury in fact" to an interest arguably within the zone of protected or regulated interests. *Association of Date Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 152-

53, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). However, courts should not render advisory opinions upon issues which are not pressed before the court, precisely framed and necessary for decision. *United States v. Fruehauf*, 365 U.S. 146, 157, 81 S.Ct. 547, 553, 5 L.Ed.2d 476 (1961); *see also Arizona v. California*, 283 U.S. 423, 463-64, 51 S.Ct. 522, 529, 75 L.Ed. 1154 (1931) (when there is no immediate threat of injury the court will not consider hypothetical questions).

Here, the district court denied the Tribe standing to complain about a potentially injurious situation that may occur if many parcels of Project land are reclassified from bottom to bench, with the concomitant increase in the allocation of water to those parcels. The potential for this injury was recognized by the district court's final order, which stated:

> [The Tribe] is vitally interested in the instant bench-bottom land controversy because the aggregate acreage assigned a bench land water duty rather than a bottom land water duty may make a difference of thousands of acre feet of water available to Pyramid Lake. This is a significant interest.

The district court, however, proceeded on the assumption that the Tribe would not be adversely affected by the decision as to any particular farm because the incremental effect of changing an individual classification is minimal. The problem is that the total effect on the Tribe's water rights is ultimately the sum of the individual parts. The only way the Tribe can affect that sum is by participating in the determination of the proper bench/bottom classification for the individual farms. Accordingly, the order prospectively denying standing to the Tribe in future disputes must be reversed.

We reject the Tribe's request that the case be remanded to a different district court judge. The district court judge has handled this and other similar litigation for a number of years and is thus in the best position to resolve this dispute.

CONCLUSION

The judgment of the district court is reversed and remanded with instructions to conduct a review under the arbitrary and capricious standard because DOI's initial classification of bench/bottom constituted appropriate agency action under section 10 of the Reclamation Act. The district court erred in ruling that the Tribe lacked standing to initiate or participate in future proceedings to reclassify individually owned farm units as bench bottom land and on remand the district court is instructed to enter an order permitting such participation.

REVERSED AND REMANDED.

Appendix O

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 88-2539
DC# D-0185-BRT
(District of Nevada)

United States of America,
Plaintiff-Appellee,
vs.
Alpine Land and Reservoir Co.,
Defendant,
and
Truckee-Carson Irrigation District,
Defendant-Appellee

No. 88-2541
DC# D-0185-BRT

United States of America,
Plaintiff,
vs.
Alpine Land and Reservoir Co.,
Defendant,
and
Truckee-Carson Irrigation District,
Defendant-Appellee
vs.
Pyramid Lake Paiute Tribe of Indians,
Defendant-Appellant.

Filed Feb. 27, 1990

ORDER

Before: SCHROEDER and CANBY, Circuit Judges, and LEW,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Honorable Ronald S. W. Lew, United States District Judge for the Central District of California, sitting by designation.